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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 177.

JAMES COFFEY, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF HARLAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JANUARY 3, 1906.

(20,034.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 27, 1906.

1 Pleas Before the Honorable William H. Munger, Judge of the District Court of the United States for the District of Nebraska, sitting in the Circuit Court of the United States for the District of Nebraska, within the Eighth Judicial Circuit, at the November, 1905, Term Thereof.

Be it remembered, That on the 18th day of May, 1905, amended petition was filed in the Clerk's office of the said Circuit Court, which said Amended Petition is in words and figures following, to-wit:—

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES COFFEY, Plaintiff,
vs.
THE COUNTY OF HARLAN, IN THE STATE OF NEBRASKA, Defendant.

Action at Law.

Amended Petition.

I.

Plaintiff states that he is a citizen of the state of Kansas, and that the defendant is one of the duly organized and existing counties of the State of Nebraska, and a citizen of the state of Nebraska, and that the matter in dispute in this suit exceeds the sum or value of Two Thousand Dollars ($2,000.00) exclusive of interest and costs.

For a first cause of action the plaintiff states: he has a legal estate in, and is entitled to the immediate possession of the following
2 described real property, situated in said county of Harlan and State of Nebraska, to-wit: The East half (½) of the Southeast quarter (¼) of Section one (1) and Lots Two (2) and Three (3) of Section Twelve (12), all in Township One (1) North of Range seventeen (17) West of the sixth (6th) Principal Meridian, and said defendant unlawfully keeps him out of the possession thereof.

That plaintiff and defendant claim said premises from a common source of title, to-wit: One Ezra S. Whitney. That plaintiff claims title through a deed of the said Ezra S. Whitney and wife conveying said premises, made and executed November 29, 1898, and filed for record in the office of the Register of Deeds of Harlan County, Nebraska, November 30, 1898; and the defendant claims the legal title and ownership of said premises by virtue of a sheriff's deed thereto, dated February 13, 1899, which deed was duly filed for record in the office of the Register of Deeds of Harlan County, Nebraska, on February 14, 1899; that said sheriff's deed under which defendant claims, is based upon an execution sale made by the sheriff of Harlan County, Nebraska, on the 12th day of April, 1898, which execution was issued upon a certain judgment rendered by the District Court of Harlan

County, Nebraska, on the 15th day of May, 1897, in a certain criminal prosecution in which the state of Nebraska was plaintiff and Ezra S. Whitney defendant, in which criminal proceeding the said Ezra S. Whitney was charged with and tried for the crime of embezzlement and which trial resulted in a verdict of guilty; and said verdict set out the amount by him Ezra S. Whitney embezzled; and thereupon the said Ezra S. Whitney was sentenced to imprisonment in the State Penitentiary for a term of years and a judgment was rendered against the said Ezra S. Whitney in favor and for the benefit of Harlan County, defendant herein, in double the amount
3 so found by the jury to have been embezzled by him the said Ezra S. Whitney. That no pleading of a civil nature was filed in said cause nor was there any issue, charge or claim in said cause of any civil liability against said defendant, Ezra S. Whitney, nor was the said Ezra S. Whitney indebted to said Harlan County, nor was said Ezra S. Whitney given any opportunity whatever in said criminal suit to defend against his said civil liability, the only issue in said suit being the guilt or innocence of said Ezra S. Whitney.

That said judgment was entered under section 124 of the Code of Criminal Procedure of the State of Nebraska; that said judgment and the provisions of said section 124 providing for the rendition of said judgment, are, under the Constitution of the United States utterly void and of no force and effect; and the same is an attempt to take the property of the said Ezra S. Whitney and plaintiff as his grantee and deprive plaintiff thereof without due process of law. And the right claimed by this plaintiff in this suit and proceeding involves the right construction of the Constitution of the United States and more particularly that clause thereof which provides that no person shall be deprived of his property without due process of law.

II.

That as a second cause of action the said plaintiff states that said defendant while unlawfully keeping said plaintiff out of possession as aforesaid, has ever since the first day of December, 1899, excluded plaintiff from the rents, issues and profits of said premises, and refuses to account or pay to said plaintiff any part or value thereof. That the value of the rents, issues and profits from said date and the damages for withholding said premises from said plaintiff,
4 amount to Fifteen Hundred Dollars ($1,500.00) no part of which has been paid.

Wherefore the plaintiff asks judgment for the delivery of the possession of said property and for said sum of Fifteen Hundred Dollars damages, together with the costs of suit.

JAMES COFFEY, *Plaintiff*,
By FLANSBURG & WILLIAMS,
His Attorneys.

STATE OF NEBRASKA, *Lancaster County, ss:*

C. C. Flansburg, on his oath says he is one of the attorneys for the plaintiff in the above entitled cause, that he has read the above and

foregoing petition, knows the contents thereof, and the same are true as he verily believes; and that the plaintiff is absent from the State of Nebraska.

C. C. FLANSBURG.

Subscribed in my presence and sworn to before me this 13th day of February, 1905.

[SEAL.]

R. O. WILLIAMS,
Notary Public,
Lancaster County, Nebraska.

Endorsed: Filed May 18, 1905. Geo. H. Thummel, Clerk.

5 Thereupon afterwards, to-wit:—On the 1st day of June, 1905, Answer was filed in said case, which said Answer is in words and figures following, to-wit:—

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES COFFEY, Plaintiff,
vs.
COUNTY OF HARLAN, IN THE STATE OF NEBRASKA, Defendant.

Answer.

The defendant answering the plaintiff's petition,

First. Admits it is in possession of the property described in plaintiff's petition. Admits the defendant is one of the duly organized and existing counties in the State of Nebraska, and a citizen of the State of Nebraska. The defendant keeps the plaintiff out of the possession of the land in his petition described. The plaintiff and defendant claim the source of title to said premises was in one Ezra S. Whitney. The said Ezra S. Whitney and wife, on the 29th day of November, 1898, executed the instrument claimed by the plaintiff in his petition to be a deed and the same was filed for record in the office of the Register of Deeds on the 30th day of November 1898. The defendant among other claims to title and ownership in and to said premises claims the legal title and ownership to said premises by virtue of the sheriff's deed mentioned in plaintiff's petition.

Second. The defendant denies each and every allegation in plaintiff's petition contained not herein before specifically admitted.

6 Third. The cause of action in plaintiff's petition set forth did not accrue within ten years before this action began.

Fourth. The defendant, its predecessors and grantors have for more than ten years next before and preceding the bringing of this action, openly, notoriously and continuously held and kept said premises in possession adversely to any right of plaintiff and all other persons.

Fifth. The court ought not to have or take further cognizance of this action because the plaintiff herein claims title and ownership

solely through and under a pretended deed of conveyance of the premises described in this petition, purporting to have been made and entered into on the 23 day of June, 1902, and filed for record May 27, 1905, by and between one John Everson and wife of the County of Harlan, State of Nebraska, party of the first part and James Coffey, the plaintiff herein, of the County of Phillips, State of Kansas, party of the second part. Which said pretended deed of conveyance purported to convey from the said John Everson and wife unto the said James Coffey, his heirs and assigns forever, the said tract of land the plaintiff seeks to recover in this action. The said pretended deed of conveyance was not a *bona fide* deed of conveyance of said land but was colorable only and without consideration and was made and entered into for the sole purpose of giving jurisdiction to the courts of the United States, as the plaintiff then and there well knew, but the said John Everson is the real plaintiff in interest, and this action was commenced and is prosecuted for his sole use and benefit. The said John Everson and this defendant were before and at the time of the commencement of this action and still are both citizens of the State of Nebraska, and the plaintiff's cause of action, if he has any, is cognizable in the District Court of Harlan County in the said State of Nebraska, and not here in this court.

7

Sixth. The plaintiff claims title to the premises mentioned in his petition through and by reason of being the direct grantee of the said John Everson and by and through no other source, title or means whatever. Long before the commencement of this action and long before the plaintiff claimed any title or interest in said premises whatever, to-wit: on the eighteenth day of September, 1901, the said John Everson, for the sole purpose of trying the title to said premises, trespassed thereon for the purpose of inducing the defendant to cause him to be arrested in a criminal prosecution and in such criminal prosecution the title to said premises might be tried and determined. Thereafter to-wit: on the twenty-seventh day of September, 1901 in pursuance of the said purpose of the said John Everson, this defendant caused a complaint to be filed with the County Judge of said Harlan county, which complaint is and was in words and figures as follows:

In the County Court of Harlan County, Nebraska.

STATE OF NEBRASKA, Plaintiff,
vs.
JOHN EVERSON, Defendant.

Complaint for Cutting Down and Destroying Trees.

STATE OF NEBRASKA, *Harlan County, ss:*

The complaint and information of A. D. McCullough of the county aforesaid made in the name of the State of Nebraska before me the undersigned, a County Judge within and for said County this 27th day of September A. D. 1901, who being first duly sworn on his

oath says that John Everson on the 18th day of September, 1901, in the County aforesaid then and there being, did then and there unlawfully willfully and maliciously and without awful authority destroyed and cut down certain trees to-wit: Thirty-ive forest trees of the value of twenty-five dollars ($25.00) then and here standing and growing in a grove on lands owned by Harlan County, Nebraska, a municipal corporation. The said trees being he property of the said Harlan County contrary to the form of the tatute in such cases made and provided and against the peace and lignity of the people of the State of Nebraska.

D. A. McCULLOUGH,
Chairman Board of Supervisors,
Harlan County, Nebraska.

Subscribed in my presence and sworn to before me this 27th day of September, 1901.

C. M. MILLER,
County Judge.

[SEAL.]

Thereafter to-wit: on the 28th day of September, 1901, the said John Everson was duly arraigned and plead "Not Guilty" to said complaint, in said action then duly pending before said County Judge wherein the State of Nebraska was plaintiff and the said John Everson was defendant and afterwards to-wit: on said 28th day of September, 1901 the said John Everson was put upon trial for said offense set forth in said complaint, and upon trial duly had before said County Judge in said action the said John Everson was duly found guilty as in said complaint alleged and was duly sentenced to pay a fine of One Hundred Dollars and costs of suit. Thereafter to-wit:—on the 28th day of September 1901 the said John Everson appealed from said sentence and fine to the District Court of said Harlan County and said cause being duly and regularly appealed and transferred to the said District Court of said Harlan
9 County and docketed therein and at the October term thereof, the said John Everson being present in court, a jury was regularly empaneled and sworn to try said issue joined on said complaint of the State of Nebraska against said John Everson and trial was then and there, in the District Court of said Harlan County on the first day of October 1901 duly had, and thereafter on the said first day of October 1901, the jury having heard all the testimony, the instruction of the court and the arguments of the attorneys, retired to deliberate on the verdict and after having deliberated on their verdict on the said first day of October, 1901, returned into court with a verdict of "Guilty." Said verdict was received by the court and duly filed and entered of record and said John Everson was duly adjudged and sentenced to pay the State of Nebraska a fine of One Dollar and costs of prosecution, and to stand committed until said fine and costs were paid. Thereafter to-wit: on the 24th day of February, 1902, said John Everson removed said prosecution to the Supreme Court of the State of Nebraska by petition in error and caused the same to be duly docketed in the Supreme Court under the title of

John Everson, plaintiff in error, against the State of Nebraska, defendant in error, and on the Thirteenth day of January, 1903, the said judgment, sentence and fine of the District Court of the said Harlan County, was in the Supreme Court of the State of Nebraska, in all matters affirmed and said judgment, sentence and fine of said District Court is now in full force and effect and in no manner modified or reversed.

The trees mentioned in the complaint in said criminal prosecution were trees that had been growing upon the land in plaintiff's petition mentioned and were cut down and taken therefrom by
10 the said John Everson, he claiming at the time to have a legal estate in and to be the owner of said lands. At all times during the trial of said criminal cause the said John Everson claimed to be the owner of and to have a legal estate in and to be entitled to the immediate possession of said lands and justified the cutting down of said trees and the destroying of the same as owner of and having a legal estate in and right to the immediate possession of said land, and on no other grounds whatever. The same identical question as to whether or not the said John Everson had a legal estate in and was the owner of said land, or the defendant herein had a legal estate, in and was the owner of said land, was the only question in dispute, or to be determined in the trial of said criminal action. It being then and there admitted by both plaintiff and defendant on trial of said criminal case before said County Judge and in said District Court, that if the said John Everson, the immediate grantor to the plaintiff herein had a legal estate in or was the owner of said land, then in that event the said John Everson was not guilty as in said complaint charged, but if the said County of Harlan had a legal estate in or was the owner of the land in plaintiff's petition mentioned, then the said John Everson was guilty as in said complaint charged. All the facts, circumstances and testimony to sustain the title and right of the said John Everson to said land was testified to and introduced in evidence in said criminal prosecution to sustain the title and right of said John Everson to said land, that the plaintiff would introduce to sustain his title and right to said land and all the facts, circumstances and testimony to sustain the defendant's right and title to said land that the defendant would introduce to sustain its right and title to said land in this action.
11 The verdict, fine and sentence in said criminal prosecution was and is an adjudication that the claimed title and right of the said John Everson in said land was and is void and of no effect, and the plaintiff claiming only as grantee of the said John Everson and having no further or better title and right to said lands as between the plaintiff herein and the defendant herein, has been and is in said criminal prosecution adjudicated adversely to the plaintiff.

Seventh. On the 18th day of July, 1895, the said Ezra S. Whitney and wife conveyed the premises in plaintiff's petition mentioned to this defendant by a trust deed to one Sam L. Roberts as Trustee for this defendant. Said last mentioned deed being duly filed for record in the office of the County Clerk of said Harlan County on the 21st day of November 1895, and duly recorded in Book 1 Page 217 of

Record of Deeds. And by reason of said trust deed executed and delivered to said Sam L. Roberts as Trustee for this defendant, Defendant now is and for a long time prior to the commencement of this action was the owner of the premises in plaintiff's petition mentioned, by title derived through said trust deed.

Wherefore and by reason of the foregoing the plaintiff is barred and estopped from prosecuting his claimed cause of action against this defendant. The defendant, therefore prays that it may go hence without day and recover its costs in this case expended.

THE COUNTY OF HARLAN,
By W. A. MYERS, *Its Att'y.*

STATE OF NEBRASKA, *Harlan County, ss:*

W. A. Myers, being first duly sworn, deposes and says that he is County Attorney for Harlan County, and one of the at-
12 torneys for the defendant in this action; that the defendant is a corporation; Affiant further says that he believes the facts, allegations and statements contained in the foregoing answer to be true.

W. A. MYERS.

Subscribed in my presence and sworn to before me this 29th day of May, 1905.

W. G. BLACK,
Notary Public.

[SEAL.]

My commission expires Oct. 10, 1909.

Endorsed:—Filed Jun- 1, 1905, Geo. H. Thummel, Clerk.

13 Thereupon afterwards, to-wit: On the 17th day of October, 1905, Reply was filed in said case, which said Reply is in words and figures following, to-wit:

U. S. Circuit Court, District of Nebraska.

JAMES COFFEY, Pl'ff,
vs.
HARLAN COUNTY, Def't.

Reply.

Pl'ff admits the filing of the complaint by D. A. McCulloch and the proceedings thereunder as set out in defendant's answer and denies each and every other allegation therein.

JAMES COFFEY, *Pl'ff,*
By FLANSBURG & WILLIAMS,
His Att'ys.

Endorsed: Filed Oct. 17, 1905 Geo. H. Thummel, Clerk.

14 Thereupon afterwards, to-wit: On the 31st day of October, 1905, Memorandum Opinion was filed in said case, which said Memorandum Opinion is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

No. 90, "W."

JAMES COFFEY, Plaintiff,
vs.
THE COUNTY OF HARLAN, Defendant.

Memorandum Opinion.

MUNGER, *D. J.:*

This is an action of ejectment. The facts so far as necessary to a proper consideration of the question which I think need only be considered for a proper disposition of the case are as follows:

Both parties claim title through one Ezra S. Whitney. It is conceded that Whitney at one time was the owner of the real estate in question; that he was elected to the office of Treasurer of Harlan County. Subsequently criminal proceedings were instituted against him upon the charge of embezzlement. He was subsequently tried, found guilty and the amount of the sum embezzled found by the jury to be $11,190.00, and sentenced by the District Court to imprisonment for a term of two years and to pay a fine of $22,380.00 and costs. From this judgment of imprisonment and fine said Whitney duly appealed to the Supreme Court, which Court affirmed said judgment. Afterwards an execution was issued on said judgment to collect said sum of $22,380.00, and the Sheriff by virtue of said execution levied upon the real estate in ques-
15 tion and the same was sold to the defendant, Harlan County, and said sale, on the 28th day of November, 1898, was by the court duly confirmed. The Sheriff's deed, however, was not issued until the 13th day of Febrary, 1899. Said Ezra S. Whitney, on the 29th day of November, 1898, conveyed by quit claim deed, the premises in question to John Everson and William O. Woolman, who were his attorneys. Plaintiff has obtained title through them.

The question considered is as to the validity of the sale under the execution to convey the title to Harlan County.

It is claimed on the part of plaintiff that it is void for the reason that the judgment of the District Court imposing, as expressed in the judgment, a fine of $22,380.00 is void under the Fourteenth Amendment of the Constitution of the United States. It is conceded on the part of plaintiff's counsel that if said sum was a fine in the strict meaning of the term, that it was properly rendered and an execution might issue thereon. But it is urged that inasmuch as the Supreme Court of the State in the case of Everson *vs.* The State, 66 Neb., 154, decided that the same was not a fine, but a judgment, that it is void as having been rendered and the property taken under the execution without due process of law, in violation of said Fourteenth Amendment.

As I gather it from a consideration of that case, it was urged before the Court that as Section 124 of the Criminal Code provided that such fine should be enforced by execution or other process for the use only of the party or parties whose money, funds, property, securities or assets had been so embezzled, it was in conflict with Section 5, Article 8 of the Constitution of the State subsequently adopted, and hence, necessarily void.

16 The Supreme Court, however, held otherwise, and in the opinion say:

"Conceding that the judgment was a fine in the most accurate definition of that term, we can not see how it avails the plaintiff in error. The land was undoubtedly sold upon execution issued upon that judgment. If the proceeds of the judgment belong to the School Fund, then Harlan County is indebted to the School Fund for the amount paid at the sale, but it still has legal title to the land which was conveyed to it by the Sheriff. We are not, however, prepared to hold that this judgment belonged to the School Fund or that the proceeds of the judgment should be paid into that fund."

Then, after quoting from the provisions of Section 124, the Court further say:

"It will be seen by reading this statute that the fine is to operate as a judgment at law for the use of the party whose money has been embezzled, and this Court has said in a case involving the same principle that Section 5 of Article 8 of the Constitution was not intended to deprive the legislature of the power to pass statutes of this character, whereby a fixed sum in the nature of liquidated damages is given to one who has suffered injury by the wrongful act or oppression of a public officer."

The decision of the Supreme Court upholding the validity of this statute, so far as it is affected by the Constitution of the State, is binding upon this Court. Whether or not the judgment violates the Fourteenth Amendment of the Constitution of the United States is a question open for determination by the Federal Court.

It is urged on the part of plaintiff that in a criminal prosecution conducted in the name of the State against Ezra S. Whitney, a judgment rendered for the benefit of Harlan County, a third party, is one rendered without due process of law. I do not think so. The legislature undoubtedly had a right to prescribe the penalty which should be imposed upon a public officer for the crime of embezzlement, and the statute provided that such penalty should be imprisonment and a fine for the benefit of the injured party in double the sum embezzled. The issue then presented at the trial in

17 the criminal case was: first, was the defendant guilty of the crime of embezzlement; and, second, what was the amount embezzled. Of this the defendant had due notice, had an opportunity to be heard upon both propositions. The jury in due course said he was guilty of the embezzlement, and fixed the amount thereof. The law then said what the punishment should be, and whether it be denominated a fine for the benefit of the School Fund or a judgment for the benefit of the party whose property had been

embezzled, it seems to me, can make no difference in determining whether or not there was due process of law.

But, it is said, that subsequent to the institution of the criminal proceeding, and before the trial, the defendant might have made restitution, and while that would not bar the criminal prosecution, it would restore to the third party what he had lost, and, consequently, such party would have sustained no injury; and yet the crime of embezzlement would be complete before the restoration, and the jury, under the statute, would fix the amount embezzled without reference to whether a portion or the whole had been restored, and to give the party a judgment which could be enforced out of the defendant's property, without reference to the fact that restitution had been made, is not due process of law.

The answer to this is that it is within the power of the State to say what the punishment for embezzlement by a public officer shall be. The legislature has prescribed that in addition to imprisonment, a fine shall be imposed for the benefit of the party whose property was embezzled. The Supreme Court of the State have said this violates no provision of the Constitution of the State, nothwithstanding the term fine, as mentioned in the Statute, is in legal
18 effect a judgment in favor of the injured party. Such judgment however is a part of the penalty imposed by the State, and the mere fact that it is for the benefit of a third party does not, in my judgment, violate the provision of the Fourteenth Amendment, which provides that no State shall deprive any person of life, liberty or property without due process of law.

Defendant is entitled to a judgment.

Endorsed: Filed Oct. 31, 1905. Geo. H. Thummel, Clerk.

19 Thereupon afterwards, to-wit: At the November 1905,

Term of said Court, and on the 29th day of November, 1905, the following Special Findings and Judgment was signed and filed in said case and duly entered of record in Journal No. "4" of said Court, to-wit:

90, "W."

JAMES COFFEY, Plaintiff,
vs.
THE COUNTY OF HARLAN, NEBRASKA, Defendant.

This day this cause came on to be heard upon the pleadings and the evidence and was submitted to the court whereupon the court finds that one Ezra S. Whitney was the duly elected, qualified and acting treasurer of Harlan County, Nebraska, from January 5, 1894 to January 9th, 1896; and that at and prior to the time of his election to and incumbency in said office he was the owner in fee of the East half (E. ½) of the Southeast quarter (S. E. ¼) of section one (1) and lots two and three (2-3) of section twelve (12) all in township one (1) North of Range seventeen (17) West, Harlan County, Nebraska.

2. That on December 15th, 1896 a criminal information in due form was filed in the district court of Harlan County, Nebraska, as follows:

"THE STATE OF NEBRASKA
vs.
EZRA S. WHITNEY.

Information.

Be it remembered that Gomer Thomas, County Attorney in and for Harlan County, and in the 10th Judicial District of the
20 State of Nebraska, who prosecutes in the name and by the authority of the State of Nebraska, comes here in person into court at this December term A. D. 1896 thereof, and for the state of Nebraska gives the court to understand and be informed that Ezra S. Whitney was the County Treasurer of Harlan County, Nebraska from the 5th day of January, 1894, to the 9th day of January, 1896, and as such officer was charged with the collection, receipt, safe keeping, transfer and disbursement of the public money of Harlan County, Nebraska; that the said Ezra S. Whitney on the 8th day of January, 1896 in said county and state then and there being, and then and there as such officer being charged with the collection, receipt, safe keeping, transfer and disbursement of the public money of Harlan County, did then and there unlawfully, and feloniously convert to his own use and embezzle a large sum of said money to-wit: Eleven thousand one hundred and ninety dollars, belonging to Harlan County which said money had then and there come into the possession and custody of the said Ezra S. Whitney by virtue of said office and the discharge of the duties thereof.

GOMER THOMAS,
County Attorney."

3. That on the 13th day of May, 1897, upon a trial had upon said criminal information the jury returned a verdict as follows:

"We, the jury duly impanelled and sworn in the above entitled cause do find the defendant guilty, as charged in the information, and we further find the sum so embezzled to be $11,190.00."

4. That the court passed a sentence on the said Ezra S. Whitney in words and figures following:

21 "It is therefore considered and adjudged by the Court that Ezra S. Whitney, the defendant, be imprisoned in the penitentiary of the State of Nebraska, and be kept at hard labor, Sundays and Holidays excepted, for the period of two years and six months, and that he also pay a fine in the sum of $22,380, and that he pay the costs of this case, taxed at $205.08; solitary confinement is not a part of this sentence. The defendant given forty day to prepare and serve bill of exceptions. Defendant excepts.

JOHN R. THOMPSON, *Judge.*"

5. That said cause was appealed to the supreme court of Nebraska, by said Whitney and said conviction was affirmed, the record of said affirmance appearing in Volume 53, page 267 of the Nebraska Reports.

6. That on April 12, 1898, an execution issued on said criminal judgment which was duly levied on the above described land and the same was sold to Harlan County, which sale was confirmed on the 28th of November, 1898, and a sheriff's deed issued to said Harlan County on the 13th day of February, 1899.

7. That on the 29th day of November, 1899, the said Ezra S. Whitney transferred the said premises above described by quit claim deed to William O. Woolman and John Everson, his attorneys; that said William O. Woolman and wife quit-claimed said premises to John Everson and John Everson conveyed the said premises to the plaintiff herein.

8. That on September 18, 1901, the said John Everson went upon said land and cut 35 forest trees; that he was arrested on a criminal complaint in writing charging him with wilfully and maliciously cutting down the said trees, the property of Harlan County;
22 that he was tried, convicted and a fine imposed in the County Court, from which the said Everson took an appeal to the District Court; that he was found guilty therein and a fine imposed upon him; and that he appealed said cause from the District Court to the Supreme Court, wherein said conviction and fine against said Everson were affirmed, a report of which is found in Volume 66 of the Nebraska Reports, page 154. And that the said transfer of the said premises by said Everson to said Coffey was made subsequent to said final decision in the Supreme Court.

9. That on September 15, 1896, a civil action was brought in the District Court of Harlan County, Nebraska, in which the County of Harlan was plaintiff and Ezra S. Whitney and the sureties on his official bond as County Treasurer were defendants, which sought to recover the amount of money due from said Ezra S. Whitney as County Treasurer, and said action was on the 6th day of May, 1899, dismissed by said County of Harlan without prejudice.

10. That the sheriff's deed and the sale and proceedings upon which it is based are regular, valid and legal and that the title to said premises was divested thereby by due process of law and transferred to the defendant Harlan County, and that plaintiff has no title to the said premises and is not entitled to recover.

To all of which findings the plaintiff duly severally excepts. It is therefore

Ordered, Considered and Adjudged that the plaintiff take nothing by his writ; that said cause be dismissed; that the defendant go hence without day and recover of the plaintiff his costs herein expended, taxed at $—. It is further Ordered that a supersedeas bond in this case be fixed at $300.00.

W. H. MUNGER, *Judge.*

Endorsed: Filed Nov. 29, 1905. Geo. H. Thummel, clerk.

23 Thereupon afterwards, to-wit: On the 4th day of December, 1905, Assignment of Errors was filed in said case, which said Assignment of Errors is in words and figures following, to-wit:

In the Circuit Court of the United States Within and for the District of Nebraska. At Law.

JAMES COFFEY, Plaintiff,
vs.
THE COUNTY OF HARLAN, NEBRASKA, Defendant.

Assignment of Errors.

The plaintiff in this action in connection with his petition for a writ of error makes the following assignment of errors in the above entitled cause, to wit:

First: Upon the facts as found by the court the plaintiff was entitled to a judgment; and the court erred in rendering a judgment for the defendant.

Second: The court found that the judgment for damages rendered in favor of Harlan County and against Ezra S. Whitney in the criminal prosecution brought by the State of Nebraska against said Whitney for embezzlement did not deprive said Whitney of any opportunity to defend against his civil liability but constituted due process of law; and a sale of the property in controversy, under an execution issued upon said judgment so rendered, was valid, binding and divested the title according to the laws of the land. In this the court erred.

Third: The court erred in holding that the legal proceedings by which the defendant obtained title to the land in controversy constituted due process of law.

FLANSBURG & WILLIAMS,
Att'ys for James Coffey, Pl't'f.

Endorsed: Filed Dec. 4, 1905. Geo. H. Thummel, Clerk.

24 Thereupon, to-wit: On the 4th day of December, 1905, Petition for Writ of Error was filed in said case, which said Petition is in words and figures following, to-wit:—

In the Circuit Court of the United States Within and for the District of Nebraska. At Law.

JAMES COFFEY, Plaintiff,
vs.
THE COUNTY OF HARLAN, NEBRASKA, *Defendant.*

Petition for Writ of Error.

And now comes James Coffey, plaintiff herein and says that on or about the 29th day of November, 1905, this court entered a judgment

herein in favor of the defendant and against the plaintiff in which judgment certain errors were committed to the prejudice of this plaintiff all of which will more fully and in detail appear from the assignment of errors which is filed with this petition and made a part of this application.

Wherefore this plaintiff prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Supreme Court of the United States.

JAMES COFFEY, *Plaintiff*,
By FLANSBURG & WILLIAMS, *His Att'ys.*

Endorsed: Filed Dec. 4, 1905. Geo. H. Thummel, Clerk.

25 Thereupon, to-wit:—At the November 1905 Term of said Court and on the 4th day of December, 1905, the following Order Allowing Writ of Error was signed and filed in said case, and duly entered of record in Journal No. "4" of said Court, to-wit:

JAMES COFFEY, Plaintiff,
vs.
COUNTY OF HARLAN, IN THE STATE OF NEBRASKA, Defendant.

Order Allowing Writ of Error.

At a regular and stated term, to-wit—the November 1905 Term of the Circuit Court of the United States of America, of the 8th Judicial Circuit and in and for the District of Nebraska, held at the Court Room in the City of Omaha, Nebraska, on the 4th day of December, 1905, present, The Honorable William H. Munger, District Judge presiding, upon motion of C. C. Flansburg, Attorney for the Plaintiff in the above entitled cause, and upon filing a petition for a writ of error together with an assignment of errors therein, it is

Ordered that a writ of error be and the same is hereby allowed to have removed to the United States Supreme Court, the judgment heretofore entered in this cause, and the amount of the bond is hereby fixed at Three Hundred Dollars ($300.00).

W. H. MUNGER, *Judge.*

Endorsed: Filed Dec. 4, 1905. Geo. H. Thummel, Clerk.

26 Thereupon afterwards, to-wit:—On the 4th day of December 1905, a Writ of Error was allowed in said case, and a Citation duly signed and returned and filed on the 27th day of December, 1905 with proof of service endorsed thereon, the following of which are the originals:

27 The Supreme Court of the United States.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judge of the Circuit Court of the United States for the District of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court, before you or some of you between James Coffey, plaintiff and the County of Harlan, defendant wherein was drawn in question the construction of a clause of the constitution and a manifest error hath happened to the great damage of the said James Coffey, plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the supreme court of the United States together with this writ so that you have the same at Washington on the 3rd day of January, 1906, in the said supreme court, to be then and there held, that the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

W. H. MUNGER,
U. S. District Judge for Nebraska.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court the 4th day of December, in the year of our Lord 1905, and in the 130th year of the independence of the United States of America.

[Seal United States Circuit Court, District of Nebraska.]

GEO. H. THUMMEL,
Attest Clerk U. S. Circuit Court, District of Nebraska.

[Endorsed:] 90 W. United States Circuit Court, District of Nebraska. James Coffey *vs.* County of Harlan, Nebraska. Writ of error. Filed Dec. 4, 1905, A. D. Geo. H. Thummel, Clerk.

28 W. A. Myers, Attorney.

County Attorney, Harlan County, Nebraska.

ALMA, NEBRASKA, *Dec.* 13, '05.

Mr. C. C. Flansburg, Lincoln Nebr.

MY DEAR SIR: Today Mr. Everson handed me the enclosed citation, to accept service, which is dated for Jan. 3rd. As it is so late and I am not familiar with rules and procedure yet of U. S. Court, I

do not think it treating you wrong to not accept service at this time. I want to be fair with you but I do not want to in any way jeopardize the county's interest. Therefore I return citation unsigned.

Yours truly,

W. A. MYERS.

[Endorsed:] 90 W. Coffey *v.* County of Harlan. Citation. Filed Dec. 27, 1905, A. D. Geo. H. Thummel, Clerk. Schurbacker & Reilly. Fed. Cas. No. 12501. (2 Dill. 127.) Book 21.

29 STATE OF NEBRASKA, *County of Harlan:*

A. P. Shelburn on his oath deposes and says that he is the sheriff of said county of Harlan, and has no interest either directly or indirectly in the case of James Coffey *v.* Harlan county; that on the 23 day of December, 1905, in said county and state he served a true copy of the attached citation on the said defendant Harlan county, by delivering a true copy thereof to W. A. Myers, Esq., the county attorney of said county.

A. P. SHELBURN.

Signed in my presence and sworn to before me this 23 day of December, 1905.

[Seal County Court, Harlan County, Nebraska.]

C. M. MILLER,
County Judge.

30 The Supreme Court of the United States.

IN THE UNITED STATES OF AMERICA, *ss:*

To the County of Harlan Greeting:

You are hereby cited and admonished to be and appear at a session of the supreme court of the United States to be holden at the city of Washington, District of Columbia, on the 3rd day of January pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska wherein James Coffey is plaintiff in error and you are defendant in error to show cause, if any there be why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Melville W. Fuller, Chief Justice of said Supreme court this 4th day of December, in the year of our Lord one thousand nine hundred five, and of the Independence of the United States of America the one hundred thirtieth.

W. H. MUNGER,
U. S. District Judge.

I hereby acknowledge service of this citation this, 7th day of December, 1905.

THE COUNTY OF HARLAN,
By —— ——, *Its Attorney.*

[Endorsed:] 90 W.

31 Thereupon afterwards, to-wit: On the 8th day of December 1905, Bond was filed in said case, which said Bond is in words and figures following, to-wit:—

In the Circuit Court of the United States Within and for the District of Nebraska.

JAMES COFFEY, Plaintiff,
vs.
THE COUNTY OF HARLAN, NEBRASKA, Defendant.

Know all men by these presents: That we James Coffey as principal and John Everson as surety are held and firmly bound unto the defendant, the County of Harlan, in the sum of Three Hundred Dollars ($300.00) lawful money of the United States to be well and truly paid to the said defendant Harlan County, his certain attorneys executors, administrators or assigns; to which payment well and truly to be made we hereby bind ourselves, our heirs, executors, administrators jointly and severally by these presents.

Sealed with our seals and dated this 5th day of December, 1905.

Whereas, lately at a circuit court of the United States for the District of Nebraska in a suit depending in said court between James Coffey, plaintiff and the County of Harlan, defendant, a judgment was rendered against the said James Coffey, said James Coffey having obtained a writ of error (and filed a copy thereof in the clerk's office of the said court) to reverse the judgment in the aforesaid suit, and a citation directed to the said county of Harlan citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington

32 in *said circuit* on the 5th day of January next.

Now the condition of the above obligation is such that if the said James Coffey shall prosecute said writ of error to effect and answer all damages and costs if he fails to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

JAMES COFFEY,
By FLANSBURG & WILLIAMS.
JOHN EVERSON.

Sealed and delivered in the presence of
ALMA OLSON.

Approved by
W. H. MUNGER,
District Judge.

Endorsed: Filed Dec. 8, 1905. Geo. H. Thummel, Clerk.
3—177

33 Thereupon afterwards, to-wit: On the 8th day of December, 1905 Præcipe for transcript was filed in said case, which said Præcipe for transcript is in words and figures following, to-wit:

United States Circuit Court, District of Nebraska.

No. 90, Docket "W."

JAMES COFFEY, Plaintiff,
vs.
THE COUNTY OF HARLAN, IN THE STATE OF NEBRASKA, Defendant.

Præcipe for Transcript.

Please prepare Transcript for the Supreme Court of the United States in the above entitled cause, and include therein the following proceedings and papers, to-wit:

1. Amended Petition.
2. Answer of defendant.
3. Reply of Plaintiff.
4. Memorandum Opinion.
5. Special Findings, and judgment.
6. Assignment of errors.
7. Petition for Writ of Error, and Order allowing same.
8. Writ of Error.
9. Citation, and Bond.
10. Præcipe for Transcript.
11. Certificate of Clerk.

Dated this 8th day of December, 1905.

FLANSBURG & WILLIAMS,
Attorneys for Plaintiff.

Endorsed: Filed Dec. 8, 1905. Geo. H. Thummel, Clerk.

34 UNITED STATES OF AMERICA, *District of Nebraska, ss:*

Pursuant to the foregoing Writ of Error, and in obedience thereto, I, Geo. H. Thummel, Clerk of the Circuit Court of the United States for the District of Nebraska, hereby certify that in compliance with the Precipe, a copy of which is found on Page 33 hereof, the foregoing record has been made and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said Court, as mentioned in said Precipe and as indicated in the foregoing index, in the case of James Coffey *vs.* County of Harlan, Nebraska, No. 90 Docket "W," and that copies of the Writ of Error and Citation, duly certified, have been lodged and remain in my said office as such Clerk.

Witness my hand and the seal of said Court at Omaha in said District this 27th day of December, 1905.

[Seal United States Circuit Court, District of Nebraska.]

GEO. H. THUMMEL, *Clerk.*

Endorsed on cover: File No. 20,034. Nebraska, C. C. U. S. Term No. 177. James Coffey, plaintiff in error, *vs.* The County of Harlan. Filed January 3d, 1906. File No. 20,034.

FILE COPY.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

Office Supreme Court, U. S.
FILED.
JAN 10 1907
JAMES H. McKENNEY,
CLERK.

No. 177.

JAMES COFFEY,
Plaintiff in Error,

v.

THE COUNTY OF HARLAN,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

C. C. FLANSBURG AND R. O. WILLIAMS,
Attorneys for Plaintiff

WEBSTER S. MORLAN AND WILTSE A. MYERS,
Attorneys for Defendant.

JACOB NORTH & CO., PRINTERS, LINCOLN, NEB.

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1906

No. 177

JAMES COFFEY,
Plaintiff in Error,

v.

THE COUNTY OF HARLAN,
Defendent in Error.

C. C. FLANSBURG & R. O. WILLIAMS, *Attorneys for Plaintiff.*
WEBSTER S. MORLAN AND WILTSE A. MYERS, *Attorneys for Defendant.*

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This is an action of ejectment, brought to the circuit court of the United States within and for the district of Nebraska, in which James Coffey as plaintiff seeks to recover from the

county of Harlan in the state of Nebraska certain real estate held and claimed by said county of Harlan under a sheriff's deed, which deed and the proceedings and judgment upon which it rests are asserted to be void by Coffey, by reason of the fact that the judgment was rendered without any notice, and it was therefore without due process of law. A jury was waived and the cause tried by and submitted to the court, and special findings of fact were entered by it, reciting in detail the circumstances upon which each party relied to maintain his title; and as these facts are controlling in the final disposition of this cause, we reproduce here the court's findings as a part of the statement of the case. The court found:

"1. That one Ezra S. Whitney was the duly elected, qualified, and acting treasurer of Harlan county, Nebraska, from January 5, 1894, to January 9, 1896; and that at and prior to the time of his election to and incumbency in said office he was the owner in fee of the east half (E. ½) of the southeast quarter (S.E. ¼) of section one (1) and lots two (2) and three (3) of section twelve (12), all in township one (1) north of range seventeen (17) west, Harlan county, Nebraska."

"2. That on December 15, 1896, a criminal information in due form was filed in the district court of Harlan county, Nebraska, as follows:

"THE STATE OF NEBRASKA

v.

"EZRA S. WHITNEY.

"INFORMATION.

"Be it remembered that Gomer Thomas, county attorney in and for Harlan county, and in the 10th judicial district of the state of Nebraska, comes here in person into court at this December term, A.D. 1896, thereof, and for the state of Nebraska gives the court to understand and be informed that Ezra S. Whitney was the county treasurer

of Harlan county, Nebraska, from the 5th day of January, 1894, to the 9th day of January, 1896, and as such officer was charged with the collection, receipt, safe-keeping, transfer, and disbursement of the public money of Harlan county, Nebraska; that the said Ezra S. Whitney on the 8th day of January, 1896, in said county and state then and there being, and then and there as such officer being charged with the collection, receipt, safe-keeping, transfer, and disbursement of the public money of Harlan county, did then and there unlawfully and feloniously convert to his own use and embezzle a large sum of said money, to-wit: Eleven thousand one hundred ninety dollars, belonging to Harlan county, which said money had then and there come into the possession and custody of the said Ezra S. Whitney by virtue of said office and the discharge of the duties thereof.

"GOMER THOMAS, county attorney."

"3. That on the 13th day of May, 1897, upon a trial had upon said criminal information, the jury returned a verdict as follows:

"'We, the jury duly impaneled and sworn in the above entitled cause, do find the defendant guilty as charged in the information, and we further find the sum so embezzled to be $11,190.'

"4. That the court passed a sentence upon the said Ezra S. Whitney in the words and figures following:

"'It is therefore considered and adjudged by the court that Ezra S. Whitney, the defendant, be imprisoned in the penitentiary of the state of Nebraska, and be kept at hard labor, Sundays and holidays excepted, for the period of two years and six months, and that he also pay a fine in the sum of $22,380, and that he pay the costs of this case taxed at $205.08; solitary confinement is not a part of this sentence. The defendant given forty days to prepare and serve bill of exceptions. Defendant excepts.

'JOHN R. THOMPSON, judge.'"

"5. That said cause was appealed to the supreme court of Nebraska by said Whitney, and said conviction was affirmed, the record of said affirmance appearing in vol. 53, p. 287, of the Nebraska Reports."

"6. That on April 12, 1898, an execution issued on said criminal judgment, which was duly levied on the above described land, and the same was sold to Harlan county, which sale was confirmed on the 28th of November, 1898, and a sheriff's deed issued to Harlan county on the 13th of February, 1899."

"7. That on the 29th of November, 1899, the said Ezra S. Whitney transferred the said premises above described by quit-claim deed to William O. Woolman and John Everson, his attorneys; that said William O. Woolman and wife quit-claimed said premises to John Everson, and John Everson conveyed the said premises to the plaintiff herein."

"8. That on September 18, 1901, the said John Everson went upon said land and cut thirty-five forest trees; that he was arrested on a criminal complaint in writing, charging him with wilfully and maliciously cutting down the said trees, the property of Harlan county; that he was tried, convicted, and a fine imposed in the county court, from which the said Everson took an appeal to the district court; that he was found guilty therein and a fine imposed upon him; and that he appealed said cause from the district court to the supreme court, wherein said conviction and fine against said Everson were affirmed, a report of which is found in vol. 66 of the Nebraska Reports, p. 154. And that the said transfer of the said premises by said Everson to said Coffey was made subsequent to said final decision in the supreme court."

"9. That on September 15, 1896, a civil action was brought in the district court of Harlan county, Nebraska, in which the county of Harlan was plaintiff and Ezra S. Whitney and the sureties on his official bond as county treasurer were defendants, which sought to recover the amount of money due from said Ezra S. Whitney as

county treasurer, and said action was, on the 6th day of May, 1899, dismissed by the county of Harlan without prejudice."

The section of the statute under which Whitney was convicted and fined is found in the Nebraska criminal code and is (so far as necessary for our consideration) as follows:

"Sec. 124 (EMBEZZLEMENT OF PUBLIC MONEY). If any officer or other person charged with the collection, receipt, safe-keeping, transfer, or disbursement of the public money, or any part thereof, belonging to the state, or to any county or precinct, organized city or village or school district in this state, shall convert to his own use, or to the use of any other person or persons, body corporate, association, or party whatever, in any way whatever, or shall use by way of investment in any kind of security, stock, loan, property, land, or merchandise, or in any other manner or form whatever, or shall loan, with or without interest, to any company, corporation, association, or individual, any portion of the public money, or any other funds, property, bonds, securities, assets, or effects of any kind, received, controlled, or held by him for safe-keeping, transfer, or disbursement, or in any other way or manner, or for any other purpose; or if any person shall advise, aid, or in any manner participate in such act, every such act shall be deemed and held in law to be an embezzlement of so much of the said moneys or other property, as aforesaid, as shall thus be converted, loaned, or paid out as aforesaid, which is hereby declared to be a high crime, and *such officer or person or persons shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled as aforesaid, which fine shall operate as a judgment at law on all of the estate of the party so convicted and sentenced, and shall be enforced to collection by execution or other process for the use only of the party or parties whose money or other funds, property, bonds, or securities, assets, or effects of any kind*

as aforesaid has been so embezzled. And in all cases such fine, so operating as a judgment, shall only be released or entered as satisfied by the party in interest as aforesaid," etc.

Comp. Stat. Neb. 1903, p. 1942.

In order to fully understand the conditions as they existed at the commencement of this action in the circuit court, let us briefly consider the two decisions of the Nebraska supreme court, cited by the circuit court in its findings and opinion and relied on by it as controlling.

Upon Whitney's conviction and sentence he appealed to the Nebraska supreme court and challenged the correctness of that judgment of conviction on the ground of insufficiency of the information under the statute, insufficiency of the evidence to convict, and errors of procedure occurring during the trial. The judgment of *conviction* alone was assailed by Whitney in that proceeding. The *statute itself* was in no manner challenged by him. The court was not called on to construe the act nor declare the meaning of its terms. And the opinion does not in any wise deal with the meaning, terms, or effect to be given the statute. The judgment of conviction was affirmed.

Whitney v. State, 53 Neb. 287.

The other case referred to in the circuit court's opinion arose as follows: Everson, the grantee of Whitney, went into possession of the premises and cut thirty-five trees and was arrested at the instance of the county for trespass, and was tried, found guilty, and by successive appeals brought the case to the Nebraska supreme court, claiming that so much of the statute (sec. 124) as awarded the "fine" to the person whose money had been embezzled was in violation of

the Nebraska constitution of 1875, and that the deed to the county based upon the "fine," and execution sale thereunder, was therefore void. The section of the constitution referred to is sec. 5, art. 8, and is as follows:

"Sec. 5. ALL FINES, PENALTIES, and license moneys, arising under the general laws of the state, shall belong and be paid over to the counties respectively, where the same may be levied or imposed, and all fines, penalties, and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivisions less than a county, shall belong and be paid over to the same respectively. *All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of common schools in the respective subdivisions where the same may accrue.*"

Comp. Stat. Neb. 1903, p. 67.

Sec. 124, *supra*, was passed in 1866, and under a constitution which permitted a fine to be imposed for the *use* of an *individual*. But Everson contended that the constitution of 1875 (above quoted) repealed so much of that section of the criminal code (124) as awarded a "fine" to the use of *individuals* injured. It was also contended by him that the school district in the county seat where the embezzlement occurred was the real and proper beneficiary, if the fine could be awarded under the statute to any one. The court, however, held otherwise. The Nebraska supreme court held that the amount *awarded in the criminal proceeding* (in which Whitney was adjudged guilty of embezzlement) was not a "fine" within the meaning of sec. 5, art. 8, of the constitution, but that the same was a *judgment*, *"allowed as compensation to the injured party"*; and that the legislature had

"authority *in a criminal action to authorize a judgment* which shall operate *in favor of the party whose money or effects*

have been embezzled, as *compensation for the value* of the thing embezzled, and *liquidated damages for the injury.*"

Everson v. State, 66 Neb. 154.

And again the opinion says (p. 158):

"It is further insisted that the statute is unconstitutional as inflicting double punishment upon Whitney, in that, in addition to the sentence of imprisonment, this fine was imposed. We can not give our assent to this reasoning, and do not care to put ourselves upon record as holding that the *return of the property*, or the *value* of the property which the thief has embezzled or stolen, either voluntarily or by compulsory process, should be considered *any part of his punishment.*"

After that construction was given to the statute by the Nebraska supreme court, Coffey purchased the land in controversy from Everson, and instituted this action of ejectment to recover possession, claiming that inasmuch as the Nebraska supreme court had held that the award of the $22,380 was simply a judgment for the value of the property taken, and liquidated damages, and was *no part of the punishment*, such judgment was rendered without due process of law and the proceedings under it are void. The circuit court dismissed the action and held the title of Harlan county good. To reverse that judgment is the object of this proceeding; and the plaintiff in error makes the following

ASSIGNMENTS OF ERROR.

1. Upon the facts as found by the court the plaintiff was entitled to a judgment; and the court erred in rendering a judgment for the defendant.

2. The court found that the judgment for damages rendered in favor of Harlan county and against Ezra S. Whit-

ney, in the criminal prosecution brought by the state of Nebraska against said Whitney for embezzlement, did not deprive said Whitney of any opportunity to defend against his civil liability, but constituted due process of law; and a sale of the property in controversy, under an execution issued upon said judgment so rendered, was valid, binding, and divested the title according to the laws of the land. In this the court erred.

3. The court erred in holding that the legal proceedings by which the defendant obtained title to the land in controversy constituted due process of law.

BRIEF AND ARGUMENT.

While there are three assignments of error, yet in effect they present a single question, viz., Did the district court of Harlan county have any power or authority to award damages against Whitney and in favor of Harlan county, in a criminal prosecution (to which the county was not a party) brought and prosecuted by the state in its own name, to convict Whitney of a crime, no pleadings being filed except the criminal information, charging Whitney with the offense of embezzlement?

In considering the question involved here, we must start with the proposition that the construction of its own statutes and constitution by the Nebraska supreme court is conclusive and binding in this proceeding. *Claibourne Co. v. Brooks*, 111 U. S. 400; *Bucher v. Cheshire Co.*, 125 U. S. 555; *Burgess v. Seligman*, 107 U. S. 20. And the Nebraska supreme court in passing on this identical judgment held that the imprisonment alone was the *punishment* for the crime, and that the judgment rendered for $22,380 was *no part of* the punishment, but was merely "compensation for the value of

the thing embezzled, and for liquidated damages." In Nebraska the syllabus in each case is prepared by the court, and is the law of that case.

Holliday v. Brown, 34 Neb. 232.

But the opinion in *Everson v. State*, 66 Neb. 154, was prepared by the court commission, and as stated at the close of the opinion, "For the reasons stated in the foregoing opinion, the judgment is affirmed." So that in this opinion both the syllabus and the opinion are the law of the case.

The proposition, then, is simply this: Is a judgment rendered under such circumstances, one obtained upon due process of law, within the meaning of the federal constitution?

The learned circuit court, in deciding the case and dismissing the action, filed a written opinion stating the reasons therefor. An examination of this opinion will discover that the learned trial court failed entirely to apprehend the meaning given to the section (124) by the Nebraska supreme court in construing its meaning in the Everson case (66 Neb. 154). The circuit court quotes (record, 9) from the opinion in 66 Neb. the following:

> "It will be seen by reading this statute that the fine is to *operate as a judgment at law* for the *use of the party* whose money has been embezzled, and this court has said in a case involving the same principle, that sec. 5 of art. 8 of the constitution was not intended to deprive the legislature of the power to pass statutes of this character, whereby a fixed sum in the nature of liquidated damages is given to one who has suffered injury by the wrongful act or oppression of a public officer."

And commenting on it the circuit court proceeds (record, 9):

"The decision of the supreme court upholding the validity of this statute, so far as it is affected by the constitution of the state, is binding upon this court. Whether or not the judgment violates the fourteenth amendment of the Constitution of the United States is a question open for the determination by the federal court.

"It is urged on the part of plaintiff that in a criminal prosecution conducted in the name of the state against Ezra S. Whitney, a judgment rendered for the benefit of Harlan county, a third party, is one rendered without due process of law. I do not think so. The legislature had undoubtedly the right to prescribe the *penalty* which should be imposed upon a public officer for the crime of embezzlement, and the statute provided that such penalty should be imprisonment and a fine for the benefit of the injured party in double the sum embezzled."

But that opinion of the trial court *refused* to recognize or follow the construction given to the statute by the supreme court of Nebraska, which it declared in its opinion to be binding on it. The Nebraska supreme court declared that the amount awarded was *not* a "fine," but a judgment; that it was *not* a part of the *punishment*, but was *compensation* for the *injury* and in the nature of liquidated damages. Yet the circuit court in *its* opinion proceeds to declare that it *was* a part of the *punishment*, and that the legislature had the right to impose the fine, when the Nebraska supreme court had held that it was *no* part of the punishment, but was a *judgment for damages* (66 Neb. 158). Again, in its opinion the circuit court says (record, 9):

"The issue then presented at the trial in the criminal case was: First, was the defendant guilty of the crime of embezzlement; and, second, what was the amount embezzled? Of this the defendant had due notice, had an opportunity to be heard upon both propositions. The jury in due course said he was guilty of embezzlement and fixed the amount thereof. The law then said what the

> punishment should be, and whether it be denominated a fine for the benefit of the school fund or a judgment for the benefit of the party whose property had been embezzled, it seems to me can make *no difference* in determining whether there was due process of law."

If, as stated in that opinion of the circuit court, the defendant Whitney "had an opportunity to be heard upon both these propositions," that is, an opportunity to make defense to them, then there might be force in holding that even in a criminal proceeding a civil judgment might be rendered, and there would be due process of law. But the learned circuit court failed to grasp the distinction between rendering a judgment in a criminal proceeding as a part of the punishment, and rendering a judgment in the criminal case without pleadings, without issues, and without opportunity to plead and establish defenses to a recovery, merely for damages. If the award of $22,380 were a *fine*, then we admit it would be due process of law, for it would be a part of the punishment. But if it is a *judgment* for damages, and is no part of the punishment, then it is utterly void and is not due process of law, for no opportunity whatever to defend against the civil liability was given Whitney in that proceeding.

In the case at bar, the defendant Whitney, at the time the verdict of guilty was rendered, did not owe the county of Harlan a penny. For what, then, was the judgment of $22,380 rendered? The supreme court of Nebraska, in Everson v. State, 66 Neb. 154, held that it was for damages by reason of the taking and embezzling the county's money. But in order to secure a judgment, there should be some sort of liability AT THE TIME. Had the defendant Whitney been given an opportunity to do so, he would have proved, not only that he did not owe the county a dollar, but that he held their receipt *in full discharge* of *all liability* on account of his shortage as

treasurer. In a claim or demand brought to enforce a civil liability against him in favor of the county, this receipt and settlement would have been a complete bar to recovery. He had already settled with Harlan county *its damages* and canceled *that* liability. Is it possible that, with such a receipt in his possession, and under such facts, Whitney must not only pay to the county again the claim from which the settlement and receipt discharges him, but he must pay it twice over? This he *must* do if his liability is made to depend on the verdict alone, regardless of whether he had settled and liquidated his civil liability to the county; his obligation to respond in damages did not depend, therefore, upon any liability, but upon the verdict on the issue of guilty or not guilty. Nor would it make any difference if he had had no defense. He must be given his *opportunity* to present it. The supreme court of New York has well expressed the proposition as follows:

"The constitutional validity of a law is to be tested, not by what *has* been done under it, but by what *may, under its authority be done.*"

Stuart v. Palmer, 83 N. Y. 183, 188.

Nor is it due process that Whitney was in court at the time the judgment was entered, and so had knowledge or was bound to know that it was entered. Nor is the fact that one has notice by chance sufficient.

"The law must *require* notice to them, and give them the right to a hearing and an *opportunity* to be heard. . . The legislature may prescribe the *kind* of notice and the mode in which it shall be *given, but it can not dispense with all notice.*"

Stuart v. Palmer, supra.

There was no opportunity given here to defend. In a criminal prosecution the fact that he has paid the money back which he embezzled is no defense to the crime. And any attempt to show such settlement would be immaterial and improper and be rejected. There was, therefore, no opportunity in the criminal case prosecuted by the state in *its* name to make this defense to the civil liability in favor of Harlan county. It is the denial of *this right to defend* against a purely civil liability, in favor of the county, upon which the judgment for compensation and damages rests, that we assert constitutes a denial of due process of law.

These propositions were disposed of by the circuit court as follows (record, 10):

> "The answer to this is that it is within the power of the state to say what the *punishment* for embezzlement by a public officer shall be. The legislature has prescribed that, in *addition* to *imprisonment*, a *fine* shall be imposed for the benefit of the party whose property was embezzled."

The whole difficulty with the circuit court lies in the fact that the judgment for $22,380 is treated as part of the punishment, when in fact the supreme court of Nebraska says it is *not*, but is a judgment.

Suppose sec. 124 were printed in the statute as construed by the Nebraska supreme court. It would then read something as follows:

> "Such officer or person or persons shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and this shall *constitute the entire punishment for said crime;* but at the same term of court, and immediately on the coming in of the verdict of guilty, the judge may, and it is hereby made his duty to render

> a judgment against the convicted party, in double the amount found by the jury to have been embezzled, in favor of any and every party whose money has been embezzled. And it shall be no defense whatever to such judgment that the convicted party may have made full restitution to said person from whom the money was embezzled, as no opportunity will be afforded to plead or establish any defense. And said judgments shall operate as a lien on all of the estate of the convicted party and shall only be satisfied and discharged of record by the party for whose benefit it was entered; and such person may have an execution to enforce collection of the same."

Would any court anywhere hold a judgment entered under such a statute good and sufficient and within the guaranty of the federal constitution which provides for the taking of property only upon due process of law? We apprehend not. And yet that is precisely what the statute comes to under the construction given it by the supreme court of Nebraska in the Everson case (66 Neb. 154). In order to affirm that conviction, the supreme court of Nebraska was forced to adopt the construction which it did. To have held that the word "fine" meant what it says; to declare it to be a fine in fact and law would have avoided the award under the state constitution above quoted. For if the word "fine" is to be given its ordinary meaning as used in that section (124), so much of the section as authorized the "fine" was repealed by the constitution of 1875. By judicial construction this award of $22,380 is a judgment for damages, nothing more nor less. That Whitney had no opportunity of establishing his payment and discharge from his civil liability, for which the judgment was entered, is apparent. Will the law sanction such an outrage and call it due process?

A recent North Carolina decision illustrates the principle for which we contend.

Re Emmett Boyett, 136 N. C. 415.

In that case an application for a writ of habeas corpus was made on the following state of facts:

The petitioner was indicted for the murder of his wife and entered a plea of not guilty. The plea of his counsel was insanity. The jury returned a verdict of not guilty, and he was acquitted. Thereupon, the presiding trial judge, without any notice to said defendant, and without the filing of any complaint or pleading, or taking any evidence of any facts as to the mental condition of said prisoner, entered an order committing said defendant to the "hospital for the dangerous insane, to be kept in custody therein as provided by" certain acts of the legislature of that state.

The section of the act under which authority was claimed to commit him provided,

> "That when any person accused of the crime of murder . . . shall have escaped indictment, or shall have been acquitted upon the trial, upon the ground of insanity . . . the court, before which such proceedings are had, shall, in its discretion, commit such person to the hospital for the dangerous insane, to be kept in custody therein for treatment and care," etc.

The application for the writ of habeas corpus was directed to the keeper of the "hospital for the dangerous insane" and was based upon the unconstitutionality of the statute above quoted, because no provision was made for giving the person acquitted either *notice*, or an opportunity to be heard, or requiring the question of his insanity *at that time* to be inquired into; it being admitted that the state, in the exercise of its general police power, had authority to provide for the involuntary confinement of insane persons, not only for their

own care and protection, but for the protection of others as well. But the objection was to the *manner* of proceeding; it being contended in the very nature of things, that under the *constitution* no commitment could be made except *after judicial inquiry*, in which the accused *must* be notified and given an *opportunity* to appear and defend. The court, after referring to many adjudicated cases, says:

> "It is not necessary to discuss the question what is 'due process of law' or to adopt any of the various definitions thereof. There is here, in no possible aspect, anything approaching the requirements of due process of law."

The reasoning in that case is by analogy, it seems to us, decisive of the case at bar. What opportunity had Whitney in the criminal trial to show that at *that* time he did not owe the county anything? The verdict found that he had embezzled $11,190 as stated in the information, but the information charged this to have occurred in 1896. The county of Harlan was not in that case asking anything from Whitney; nor could it have intervened to prove its debt. It had a separate suit pending in that court for that purpose (record, 12). There was no finding in the verdict of the jury as to what, if anything, Whitney owed the county of Harlan at the time of its rendition. Had Whitney been given an opportunity he would have established that, at *that time*, he had settled in full with the county. And yet a judgment for $22,380 is rendered for "*compensation*" for taking $11,190, which had been returned and the county satisfied, before the conviction was established. Whitney was denied all opportunity to prove his defense to the claim of Harlan county. The proceeding by which this so-called judgment was obtained was what Mr. Justice Story characterized "a solemn fraud." The court had no jurisdiction whatever to render the judgment.

Jurisdiction is the right to hear and determine, not the right to determine without a hearing.

Windsor v. McVeigh, 93 U. S. 274 (L. Ed. 23, 914).
Hovey v. Elliot, 167 U. S. 409 (L. Ed. 42, 215).
Gaplin v. Page, 85 U. S. 350 (L. Ed. 21, 959).
Ex Parte Wall, 107 U. S. 289 (L. Ed. 27, 562).

In *Gaplin v. Page, supra*, it is said:

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear and *has been afforded an opportunity to be heard.* Judgment without such *citation* and *opportunity* wants all the attributes of a judicial determination; it is judicial usurpation, and can never be upheld where justice is justly administered."

In *Windsor v. McVeigh, supra*, it is said:

"The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Whenever one is assailed in his person, or his property, *there he may defend, for the liability and the right are inseparable.* This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party, without hearing him or giving him an opportunity to be heard, is *not a judicial determination of his rights*, and is not entitled to *respect in any other tribunal.*"

And again in the same opinion it is said:

"The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, can not be collaterally assailed, is undoubtedly correct as a general proposition, but like all

general propositions is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil and criminal; or to particular modes of administering relief, such as legal or equitable; . . . though a court may possess jurisdiction of the cause and the subject-matter and the parties, it is still limited in modes of procedure, and in the extent and character of its judgments. It must act judicially in all things and can not then transcend the power conferred by law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the parties and subject, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for libel or personal tort, the court can not order, in the case, the specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgment given, in the cases supposed, would not be merely erroneous; they would be *absolutely void* because the court in rendering them would transcend the limits of its authority in those cases. . . . And the reason is that the courts are not authorized to exert their power in that way. The doctrine stated by counsel is only correct where the court proceeds, after acquiring jurisdiction of the cause according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

To say that the courts have an inherent right to render a civil judgment in a criminal proceeding, where the only issue is the guilt or innocence of the accused, is to declare that a court is possessed of the right to enter judgment without pleadings or issue, and deny all defenses on such civil liability, and that a court has full power in such criminal case to redress the damages (suffered by the criminal act)—without

trial, pleadings, issues, or hearing. The civil judgment in such a proceeding is made, therefore, to depend, not upon any legal liability, but upon the *result* of the criminal case; in the very nature of things such a holding would, under the authorities above cited, convert the court exercising such an authority into an instrument of oppression and injustice, and hence strip it of that very attribute of justice upon which the exercise of judicial power depends, viz., deliberation *after hearing.*

In the Dartmouth College Cases, 17 U. S. (4 L. Ed. 4), 629, Mr. Webster defines due process of law as follows (p. 581):

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon *inquiry* and renders judgment *only after trial.* The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

This definition is quoted with approval by the U. S. Supreme Court in *Ex Parte Wall, supra.*

In *Hovey v. Elliott, supra,* the court says (p. 417):

"Can it be doubted that due process of law signifies the right to be heard in one's defense? If the *legislative department* of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and foundation of justice itself, has yet the authority to render lawful that which, done under express legislative sanction, would be violative of the constitution?"

In *Underwood v. McVeigh,* 23 Grattan, 409, the supreme court of Virginia held that the refusal to permit a defendant

to be heard rendered the judgment absolutely void. The court says:

> "It was rendered absolutely void by the act of the court in refusing to permit McVeigh to appear and be heard. The authorities on this point are overwhelming, and the decisions of all the tribunals of every country where an enlightened jurisprudence prevails are all one way. It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have the *opportunity of being heard in defense*, both in repelling the allegations of fact and upon the matters of law; and no sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte* and without opportunity of defense."

The doctrine of all these cases may be said to be that the judgment was void because no opportunity was given to defend. And it makes no difference in its legal effect how that result is brought about. It is the result—the denial of an opportunity to defend—that avoids the judgment. If the action of a court in refusing a defendant permission to answer and opportunity to defend is a denial "of due process of law," then clearly a legislative enactment which by its terms denies to a defendant such privilege and opportunity of defense must, when enforced by the order of a court, likewise constitute a denial of "due process of law."

Mr. Justice White, speaking for this court, in the opinion in

Simon v. Craft, 182 U. S. 427,

says (page 436):

> "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things, and not by mere form."

In the judgment complained of in the case at bar both these "essential elements of due process of law" are wanting.

In all personal actions a *personal notice* and *opportunity to defend* must be afforded; and if either is withheld the court is without power and its judgment void as in contravention of due process of law. The seeming exceptions, however, to this rule, found outside of judicial tribunals, are still in strict accordance with "the law of the land."

In *Den v. Hoboken Land and Imp. Co.* 59 U. S. (18 How.), 272, the facts were, the collector of the port of New York was short in his accounts to the government upward of a million and a half of dollars; the act of 1820 provided for the issuing of a distress warrant, in such cases, and that it should be a lien on the lands of the debtor from the time of the levy and record thereof in the office of the district court of the United States for the proper district. A warrant was issued against the collector and his land sold thereunder to the plaintiffs. Subsequently, upon a judgment duly rendered against the collector, the same land was levied on and sold to the defendant. The suit was ejectment; the defendants claiming that the summary method of levy and sale under the distress warrant was a denial of due process of law. The court held otherwise, and after reviewing authorities and practices in England before the adoption of our constitution, declared that in regard to the King's revenue such summary methods were indulged, and that the act of 1820 and the procedure under it were "according to the law of the land," and consequently the title under the distress warrant was valid.

In *Johnson v. Chicago, etc., Elevator Co.*, 119 U. S. 388 (L. Ed. 447), the facts were, the jib boom of a schooner struck against the defendant's building on the bank of the Chicago river, making a breach in its walls, whereby a quantity of grain ran out and was lost. By attachment issuing out of the state court the boat was taken and a redelivery bond given by the owner of the tug, and one Christy, as surety, conditioned to pay any judgment rendered by the court in said cause. Subsequently the damages were ascertained and a judgment rendered against both principal *and surety*, in accordance with the practice of the state of Illinois and the construction given by it to its statutes. It was argued that the judgment against Christy was in violation of the due process clause of the constitution, he having had no notice in the case in which judgment was entered. This court held that the view of the Illinois court was right, viz., that by signing the bond Christy "virtually consented that judgment might go against him" under the statute, "if the plaintiff should be entitled to judgment against Johnson" and the validity of the judgment (it being according to the Illinois practice) was affirmed.

In *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230 (L. Ed. 747) the facts were these: the railroad company was not made a formal party defendant by name, but was in possession of the physical property mortgaged by its assignor, receiving the income therefrom. It filed the answer for and conducted the defense in the name of its assignor, and the issues were hotly contested by it. After judgment rendered against the mortgagor company, a rule was entered against the Louisville & N. R. Co. to show cause why it should not pay the judgment, it having possession of the physical property and income of the mortgagor company (its assignor),

and said assignor being without means of payment. Unde
said rule it returned that it had not been made a party to th
judgment, claiming also to have an additional defense b
way of setoff, whereupon the lower court discharged the rul
The court of appeals of Kentucky reversed this holding an
ordered the judgment entered. By writ of error the caus
came to this court for review, upon the contention that th
judgment so entered was without due process of law, an
that it had been denied an opportunity to be heard in the de
fense of its setoff. This court, in affirming that case, say
(page 239) that its action in appearing for the assignor an
conducting the defense gave it its day in court; continuing
the court says (page 239):

"The argument therefore asks us to say that the Louisville &
Nashville in the proceeding *in which it was duly served
and to which it responded*, and as to which it *had its
day in court*, was deprived of defenses which it never as
serted, and that due process of law was not administered
to it because it was unheard in respect to matters con
cerning which it made no claim. . . . True it is that
in *Rees v. Watertown*, 19 Wall. 107, it was said:
'*Whether in fact the individual has a defense to the debt,
or by way of exemption, or is without defense, is not im
portant.* To assume that he has none, and that therefore
he is entitled to no day in court, is to assume against
him the very point he may wish to contest.' But this
truism was stated with reference to a case where it was
argued that a condemnation without notice could be jus
tified on the assumption that if notice had been given, no
defense could have been made."

The court's differentiation of the case in the 19 Wall is the
precise distinction in the case at bar; and the rule of that
case (*Rees v. Watertown*) is altogether applicable to and
decisive of the instant contention.

In *Davidson v. Board of Admins.*, 96 U. S. 97 (L. Ed. 616), the facts were, the board of administration of the city of New Orleans created a drainage district to remove by ditches and canals the waters from a large tract of swampy land, the cost of such removal to be assessed against the property benefited. Opportunity to file in court objections to the assessment was provided by law, of which provisions the plaintiff availed herself. Judgment having been awarded against the property by the supreme court of Louisiana, writ of error was sued out to this court on the ground that the proceeding was wanting in due process of law. It was held, in affirming the judgment, that it was not necessary, in order to constitute due process of law, that the right asserted against the individual or the burden imposed upon his property for public use should in all cases be done by resort to a court of justice; and that, where a burden was imposed upon property which required the act of a court to render it final, or permitted the parties an opportunity to present their objection in court, it *was* due process within the constitution. Such cases, although no notice was actually served, would, we concede, be due process of law and yet have no application to the case at bar.

To the same effect is *Fallbrook Irr. Dis. v. Bradley*, 164 U. S. 112 (L. Ed. 369).

In *Cincinnati &c. R. R. v. Kentucky*, 115 U. S. 321 (L. Ed. 416), the facts were, the board of railroad commissioners made the assessment against the railroads of the state upon data and schedules furnished by the companies. The act pro-

vided that upon the failure to pay the taxes so levied the state should bring suit in one of its counties. Suit having been brought, the companies defended on the ground that the assessment having been made without notice was a taking of their property in violation of the due process clause of the constitution. This court, however, held otherwise, inasmuch as full opportunity to defend was given in the suit to enforce collection of the taxes.

In

Wilson v. Standefer, 184 U. S. 399 (L. Ed. 612),

a suit was instituted in the state court to recover forfeited school lands under contract of purchase from the state of Texas. The law permitted the state to forfeit upon default in payment, but provided that suit might be instituted at any time within six months thereafter to reinstate upon a showing that there was in fact no default. This court held that a forfeiture under such act did not deprive the purchaser of his property without due process of law, as the law provided an opportunity to appear in court and set aside the forfeiture if invalid or improperly entered.

In

Wilson v. The State of No. Car. ex rel., 169 U. S. 586 (L. Ed. 865),

the question was whether the suspension of a railroad commissioner from office, by the governor, under the law of North Carolina (which by its terms provided that such suspension

was to be reported by the governor to the next legislature, when, if he was not removed by its action, he was to be considered reinstated) was a deprivation of his rights without due process of law, and this court held that the controversy related solely to a state office, and that the right thereto must be measured by the statutes and constitution of the state.

In

Hodge v. Muscatine County, 196 U. S. 276 (L. Ed. 477),

the question was as to the validity of the Iowa cigarette law, which made the annual charge imposed by the Iowa code upon cigarette dealers a lien "upon the real property and the owner thereof" wherein cigarettes are sold. The law provided that the owner might apply to the board of supervisors to remit the tax, and in case of a denial of such petition, a right of appeal was given to the district court. And this court held that such provision for appeal constituted due process of law.

In

Lowe v. Kansas, 163 U. S. 81 (L. Ed. 78),

the statute of Kansas provided that in a criminal prosecution for libel the complaining witness should be liable for costs whenever it should be made to appear that the prosecution was malicious and without probable cause, and judgment

should be rendered against him for that amount upon the finding of the jury. Lowe was adjudged to pay costs under said act, which judgment was affirmed by the supreme court of Kansas, whereupon Lowe sued out a writ of error to this court, challenging the validity of such judgment on the ground of want of due process of law. This court affirmed the judgment of the supreme court of Kansas on the ground that, long before the separation of the colonies from the mother country, costs were granted against informers under the penal statutes, and that inasmuch as Lowe was an actor in the libel suit with power to direct its conduct and *opportunity to offer evidence and be heard upon the issues*, the judgment for costs was not a denial of due process of law.

In none of these cases was there any denial of the right to be heard in defense. In the case at bar the opportunity to defend was lacking. Suppose on a criminal trial Whitney had been permitted to prove a repayment of the money embezzled and full settlement of the county's claim; suppose the jury had found the amount of the embezzlement to be $11,190, and that Whitney had, subsequent to said embezzlement, paid the county in full; would it not be the duty of the court under the statute to enter a judgment for double the amount embezzled? Is not this the exact command of the statute? But in the criminal case such proof would be *immaterial and improper*. In a civil case it would *defeat recovery*. Why, then, should he be bound to offer it in a criminal case when such evidence was not within the issues? Why should he be compelled to offer proof in defense of a civil liability when there was no issue in the case charging him with such liability? The interpretation of its statute and constitution by the supreme court of Nebraska is bind-

ing on this court. The judgment under which the county claims title to the land in controversy is a civil judgment, based on a civil liability, according to that interpretation. The only question for this court to decide is whether a judgment, based upon a civil liability, can be entered against a defendant in a criminal case, in favor of a stranger to the record, without any claim made by said stranger, without any petition or even request for judgment on his claim, without notice to said defendant, and without opportunity for him to defend?

An unconstitutional statute affords protection to no one who has acted under it. And the judgment rendered in accordance with its mandate is a nullity everywhere.

Simonds v. Simonds, 103 Mass. 572.
Campbell v. Sherman, 35 Wis. 103.
Monore v. Collins, 17 Oh. St. 665.
Astrom v. Hammond, 3 McLean, 107 Fed. Cases, No. 596.
Woolsey v. Dodge, 6 Id. 142, Fed. Cases, No. 18032.

A judgment rendered by the court upon a matter not within the pleadings nor tendered by the issues of the case must be treated as a nullity.

Reynolds v. Stockton, 43 N. J. Eq. 211.
Reynolds v. Stockton, 140 U. S. 254; L. Ed., 35, 464.
Munday v. Vail, 34 N. J. L. 418.
Unfried v. Heberer, 63 Ind. 67.
Smith v. Ontario, 18 Blatchf. 454.

In the case of *Reynolds v. Stockton*, 140 U. S. *supra*, Mr. Justice Brewer, after quoting from the opinion of the supreme court of New Jersey in *Munday v. Vail*, says:

"That in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be *responsive to the issues tendered by the pleadings*. In other words, that when a complaint tenders one cause of action, and in that suit service on or appearance of the defendant is made, a subsequent judgment rendered therein, in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same state, and, of course, notwithstanding the constitutional provision heretofore quoted, has no better standing in the courts of another state."

The judgment of a court acting without authority is a nullity.

Hogan v. Wahrenberger, 9 Tex. 313 (58 Am. Dec. 145).

Seamster et al. v. Blackstock, 83 Va. 232.

Dunlap v. Southerlin, 63 Tex. 38.

II.

In the hearing at the circuit defendant cited a large number of cases to the effect that the state has power to punish a criminal offense by both fine and imprisonment, and that

a fine could be collected by the levy of an execution upon the property of the convicted person and sale thereunder, and that such a judgment imposing the fine as a part of the punishment was due process of law.

With these authorities we do not differ. But the difficulty with defendant's citation is that they do not present the question which we raise. The question is not the power of a state to inflict both fine and imprisonment for an offense; nor yet the right to collect a fine by execution. The proposition, as already stated, is, has the court the power, the jurisdiction, in a criminal case, to render a judgment in compensation for the civil injury in favor of the one injured, when he is not a party to the suit, and when there is no pleading, claim, or demand by such party for such compensation, and where the only issue in the case is the guilt or innocence of the accused?

III.

But another point made at the hearing before the circuit court was that the decision in the case of *Everson v. State* (66 Neb. 154) was in effect an adjudication of the title and therefore binding as *res judicata*. Such is not the law.

A judgment in a criminal case is not a bar in a civil case and can not be pleaded as an estoppel.

U. S. v. Schneider, 35 Fed. Rep. 107.
Coffey v. U. S., 116 U. S. 436 (L. Ed. 29-684).
Betts v. New Hartford, 25 Conn. 180.
Clark v. Irwin, 9 Ohio, 131.
Mead v. Boston, 3 Cush. 404.
Corbley v. Wilson, 71 Ill. 209.
Ches. & O. Ry. v. Dyer County (Tenn.), 11 S. W. Rep. 943, 945.
Hutchinson v. The Bank, Etc., 41 Pa. St. 42.

Wharton, Evidence, sec. 777.
Potter v. Baker, 19 N. H. 166.

In *Wharton on Evidence*, sec. 777, it is said:

"The reasons why a judgment in a civil case should bind all subsequent proceedings between the same parties on the same cause of action do not apply, so it is generally argued, when a criminal judgment is sought to be afterwards used in civil litigation. In the first place, while the parties to a civil suit by appearing accept the arbitrament of the court, and thereby enter into obligation to be bound thereby, in a criminal prosecution the defendant is regarded as attending by compulsion, and as entering into no such obligation. In the second place, the parties to a civil suit can not be identical with those of a criminal suit, for in a criminal suit it is the sovereign who, nominally at least, prosecutes. Hence, in the Roman law as well as in our own, a prior criminal judgment is not conclusive as to a subsequent civil suit for the same subject matter."

In *Betts v. New Hartford*, 25 Conn. 180, the facts were that one Chapin was the owner of a tract of land and had sold lots adjoining the continuation of a highway, and had platted the highway and named it, but had not dedicated it. He told the parties to whom he sold that the town would purchase it ultimately and make it a public highway. Chapin placed obstructions upon the portion platted as a street, and was arrested for obstructing a public highway and fined four dollars. He appealed to the county court, where he was tried, convicted, and fined ten dollars. He sued out an error proceeding, but the superior court refused to disturb the fine. Proceedings were subsequently instituted to lay out the road in the place where it was platted by Chapin, and Chapin demanded damages for the taking. The record of his conviction in obstructing the public highway was offered to show that the matter was adjudicated against him and that he was

estopped to assert claim to the land. Speaking upon this point, th supreme court says (p. 184):

"A verdict in a criminal case is not evidence of the facts upon which judgment was rendered, when those facts come up in a civil case, for this evidence would not be material; and so the law is perfectly well settled."

In *United States v. Schneider*, 35 Fed. Rep. 107, the suit was brought to recover of the defendant certain tax due as a wholesaler of malt liquors. Previous to the bringing of the civil suit to recover the tax a criminal prosecution had been begun against the defendant by the United States, charging him with being a wholesaler of malt liquors, and with having as such dealer violated the law. In this prosecution he was acquitted, and this acquittal was pleaded as an estoppel against the civil suit. The court in disposing of the matter said (p. 108):

"The two actions arise out of exactly the same circumstances. It is material to allege and prove in either case that the defendant was a wholesale dealer in malt liquors. And the question now is, Can the finding of the fact in the criminal action that the defendant was not such dealer be pleaded as an estoppel in this civil action?

"As a general rule this can not be done, for the reason that the parties to the two actions are seldom the same; the criminal one being prosecuted by and in the name of the state, and the civil one by the party injured by the act or conduct constituting the crime. 1 Greenl. Ev., sec. 537; I What. Ev., sec. 776. But it so happens that the parties are the same in both these actions.

"Another reason given against the estoppel in such cases is that the rules of decision and the course of proceedings are not the same in the two actions, and therefore different results may properly be reached in the trial of them. 1 Greenl. Ev., sec. 537; 1 What. Ev., sec. 776.

" . . . The only material difference in this court is that in the former case the verdict must be for the defendant unless the evidence established his guilt beyond a reasonable doubt, while in the latter it is given for or against him, according to the preponderance of the evidence.

"This, in theory at least, is a material difference, and it may be that the same jury, on the same evidence, acting on this rule would find the defendant was a dealer in malt liquors, as alleged in the civil action, and refuse to do so in a criminal one. Therefore the United States is not estopped by the verdict in the criminal action, to allege and prove in this one that the defendant was a wholesale dealer in malt liquors."

The case of *Coffey v. United States*, 116 U. S. 436, seems to hold that where parties are the same identically there is an estoppel. But that case is not necessarily at variance with the one above, as a careful reading will discover. In that case, however, the court states the general rule as follows:

"When an acquittal in a criminal prosecution in behalf of the government is pleaded or offered in evidence, by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same; and often for the additional reason that certain intent must be proved to support the indictment, which need not be proved to support the civil action. But in this record, as we have already seen, the parties and the matter in issue are the same."

In *Clark v. Irwin*, 9 Ohio, it is said that:

"Neither the plea of guilty in a criminal prosecution, nor the judgment founded upon it are conclusive against the defendant in a civil suit."

And that

"Such plea stands like any other confession of a party, and may be controverted."

In *Mead v. Boston*, 3 Cush., it is said by the court (p. 407):

"We are strongly inclined to the opinion, that in no case is the conviction in a criminal case conclusive, because it may have been obtained upon the testimony of the plaintiff, or other persons interested. It is not the fact, that the verdict was or was not obtained upon the testimony of the plaintiff, or of some other party interested, that renders the conviction incompetent evidence, but it is rejected because it is *res inter alios*. And one reason why any person can be received as a witness in a criminal case is that the conviction or acquittal can not be used elsewhere, and between other parties. The admission in a civil action of a conviction upon an indictment, founded on a plea of guilty, is no exception to this rule. That is received, not as a judicial act, having the force and effect of a judgment, but as a solemn confession of the very matter charged in the civil action."

The learned circuit court, under the authorities, very properly held that said judgment was not *res judicata*.

The single question in the case is one of power in the district court of Nebraska to render a civil judgment in a criminal case, under the law of Nebraska as construed by its supreme court.

We think such pretended judgment void as lacking in due process, and all proceedings under it void. If this court so holds, the plaintiff's title is good, and he is entitled to recover.

JAMES COFFEY, by
C. C. FLANSBURG,
R. O. WILLIAMS,
His Attorneys.

No. 177.

FILE COPY.

In the Supreme Court of the United States.

No. 20,034.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

JAMES COFFEY,
Plaintiff in Error,

vs.

THE COUNTY OF HARLAN,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

J. W. DEWEESE,
Attorney for Defendant.

W. A. MYERS,
W. S. MORLAN,
Of Counsel.

TRIBUNE PRINTERY, M'COOK, NEBRASKA

In the Supreme Court of the United States.

JAMES COFFEY,
Plaintiff in Error,
v.
THE COUNTY OF HARLAN,
Defendant in Error.
No. 20,034.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiff, in this case, asks the court to construe the constitution of the State of Nebraska and the constitutionality of the provisions of the state statute. It cannot be seriously questioned that the state can punish for violations of its laws by forfeiture, fine and imprisonment, or any one or all of them. When the state, by virtue of statute, imposes any one or all of these penalties, the determination of the constitutionality of the statute is exclusively within the courts of the state.

Cooley on Constitutional Limitations, Sec. 39.
Fairfield v. Gallatin County, 100 U. S., 47; 25 L. Ed. 544.
Atlantic, Etc., R. Co. v. Georgia 98 U. S. 359; 25 L. Ed. 185.

The sentance in the case of the State of Nebraska v. Ezra S. Whitney has been passed on in three different cases in the Supreme Court of the state, and the constitutionality of the law which imposes as a penalty a payment on the part of the defendant of twice the amount embezzled has been sustained.

Ezra S. Whitney v. State, 53 Neb. 287-305, 73 N. W. 696.

Harlan County, Appellee v. Ezra S. Whitney, 65 Neb. 105-109, 90 N. W. 993.

John Everson v. State, 66 Neb. 154-159, 92 N. W. 137.

Ezra S. Whitney was convicted of embezzlement in the prosecution, wherein judgment was entered against him, and adjudged to be punished by both fine and imprisonment. If there was any irregularity in the judgment, it should and could have been corrected by error, to the Supreme Court of the State of Nebraska.

I.

AT COMMON LAW, A FINE COULD BE ENFORCED BY LEVY OF EXECUTION AND A SALE OF PROPERTY THEREUNDER. STATUTES PROVIDING FOR THE ISSUANCE OF EXECUTION UPON A FINE ARE DECLARATORY OF THE COMMON LAW.

In the case of Gill v. State, 39 West Va., 479; 20 S. E. 568, it was objected to the validity of an execution issued upon a fine in a misdemeanor case, that it ran against the realty as well as the personalty of the accused, the contention being made that an execution for a fine could not be levied of realty, In discussing the general proposition, the court said:

"When the prosecution for a public offense has ended in a judgment imposing a fine, it is no longer an unascertained penalty or liability, but has become fixed in amount and has become a debt, and that of the highest character—a debt of record, payable instanter—and the lawful process of execution may go upon it at COMMON LAW and under our statute. Rex v. Woolf, 1 Chit. 401, 18 E. C. L. 225, 229, 230; Kane

v. People, 8 Wend. 203; 1 Bish. Cr. Proc. sec. 1304; Code c. 36, sec. 12. The position taken above—that a judgment for a fine is a debt—is not only supported by the cases just cited, but our case of State v. Burkeholder, 30 W. Va., 593; 5 S. E. 439, supports it, as it holds the state, under its claim to a fine, to be a creditor, and the demand such a debt as will authorize the state to appeal to a court of equity to avoid a deed to the prejudice of the state as to its fine. Award of execution is not an integral part of a judgment, as it need not contain it, and such execution as the law points out may issue upon it; and the well considered cases, cited above of Rex v. Woolf and Kane v. People, holds that by common law, on a judgment for a fine, a writ of capias ad satisfaciendum, to take the body or of levari facias, to take the goods and the issues of the whole land of the defendant, could be issued, just the same as on a judgment for a debt; and it seems to me that our legislation does not intend to deprive the state of the right to go against the land, given by the common law and delay its steps in collection of money due the public treasury by compelling it to resort to chancery to enforce its recovery."

"A case then presents itself where a judgment of both imprisonment and fine stands against the defendant, and in such a case may the fine be collected by a forced sale and execution? The statute expressly authorizes a judgment of both imprisonment and fine, and, if in such a case the fine may not be collected by levy of execution and sale, it cannot be collected at all, for it is not probable that a defendant will voluntarily pay a fine in the absence of any penalty for its nonpayment, and the law being that it is nonenforcible by imprisonment, it is a nullity, as far as practical results are concerned, unless it may be collected by a forced sale. And we will not give such a construction to the law, if it is not reasonably susceptable of any other.

People v. Brown, 113 Cal., 35; 45 Pac., 181.

The same principle is recognized in the case of Howard v. Fuller, 100 Ky., 148; 37 S. W., 585, and in Huddleson v. Ruffin, 6 O., St. 604.

In the case of Ex parte Dickerson, 30 Tex., App. 448, 17 S. E., 1076, it was objected to the validity of a judgment in a criminal case imposing a fine and imprisonment, that the judgment was void for the reason that it did not provide for execution. In holding the judgment valid the court said:

"The judgment is not only not void, but it is not voidable. The failure of the judgment to order issuance of execution does not detract from its essence of finality. Whether that be embraced in the judgment or not, the judgment is nevertheless a final one, and thoroughly capable of enforcement by means of an execution issued thereunder, or it may be enforced by a capias pro fine, or by both at the same time."

See, also, the case of State v. Terry, 17 S. W., 1075, S. C. Terry v. State, 30 Tex. App. Rep. 408.

II.

A STATUTE THAT PROVIDES, AS PART OF THE PUNISHMENT FOR EMBEZZLEMENT, FOR A FINE FOR THE USE OF THE PARTY WHOSE MONEY OR PROPERTY HAS BEEN EMBEZZLED, IS NOT UNCONSTITUTIONAL FOR THE REASON THAT IT MAKES THE AMOUNT OF THE FINE EQUAL TO DOUBLE THE AMOUNT OF MONEY OR PROPERTY EMBEZZLED.

In considering a Missouri statute imposing upon railroads the duty of fencing their right-of-way, and in the event of omission, authorizing the assessment of double damages, the Supreme Court of the United States says:

"The statutes of nearly every state of the union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property and make that increase in many cases double, in some cases treble, and even quadruple the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation."

Mo. Pac. Ry. C. v. Humes, 115 U. S., 512; 6 Sup. C., 110; 29 L. Ed., 463.
Minneapolis & St. L. Ry. C. v. Beckwith, 129 U.S., 26; 9 Sup. Ct., 207, 32 Law Ed., 585.
Mier v. Phillips Fuel Co., 107 N. W., (Iowa) 621.

"Code, Art. 2485, making any operator of a mine taking coal without permission from adjoining land liable in double damages therefor, is not violative of the fourteenth amendment to the federal constitution, prohibiting any state from depriving any person of property without due process of law, or depriving anyone within its jurisdiction of the equal protection of the laws."

Mier v. Phillips Fuel Co., 107 N. W., (Iowa) 621.

III.

The construction of a state statute and its effect upon sheriff's sale of land as determined by the highest court of a state, is conclusive upon the federal court as to the land in that state.

Henry v. Pittsburg Clay Mf'g Co., 80 Fed. Rep., 485.

The fifth amendment of the federal constitution was intended to operate as a restraint on the exercise of power by

the federal government only, and has further no application to this case. This proposition has been laid down by the courts in a long series of cases

See Twitchell v. Commonwealth, 7 Wall, (74 U. S.) 321, 19 L. Ed., 223.

In the case of Fayerweather v. Ritch, 91 Fed., 721, the second paragraph reads as follows:

"A party who has had a trial in a state court in accordance with the settled course of the judicial procedure, and has been heard in two successive appeals from the decree therein, cannot claim to have been deprived of property or rights without due process of law."

In the case of Stevens v. City of Kansas City, 146 Mo., 460; 48 S. W., 658, in holding a law providing for an appeal from the police court to the criminal court in a certain class of cases valid, the court decided that:

"A contention that complainant is about to be deprived of his property without due process of law is untenable when he had his day in court according to the procedure prescribed by law."

As a punishment for crime, a person may be deprived not only of his liberty, but of his property as well. If, for commission of an act prohibited by law, his property may be taken from him, the legislature has authority to prescribe the method by which this may be done—all that is required being that the deprivation be by due process of law. The right to punish by fine and imprisonment seems not to have been doubted in the whole history of the law, and the practice of imposing the

two forms of punishment has been so widely recognized for so long a period to say, now, this may not be done, would result in the overthrow of principles that are elemental in our system of jurisprudence.

"Neither the federal nor state constitutions have made any attempt to define what is 'due process of law' or its equivalent, nor have the courts been able to give a definition covering all possible cases. It has been said that they no longer attempt to define in a few words what is meant by these terms, but are disposed to ascertain their intent and application by the gradual process of judicial inclusion and exclusion as the cases presented for decision shall require, together with the reasoning on which such decisions may be founded."

10 Am. & Eng. Enc. Law, (2 Ed.) 291.

Again it is said:

"As applied to judicial proceedings, the term 'due process of law' means a course of proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. It is imperative that there be a court of competent jurisdiction; that the proceeding be regular and appropriate to the question involved; and that the trial be a fair one."

Id. p. 293.

In the case of Parsons v. Russell, 11 Mich., 113; 83 Am. Dec., 728, the court said:

"Whatever may be the difficulty of defining this phrase of the constitution when sought to be applied to other proceedings, when used in relation to those of a judicial character it is evidently, and has been so universally held, intended to secure to the citizen the right to a trial according to the forms of law of the questions of his liability and responsibility, be-

fore his person or his property shall be condemned. Judicial action is in such cases imperatively required, and implies and includes actor, reus, judex, regular allegations, opportunity to answer, and trial according to some settled course of judicial proceedings."

In the case of Carr v. Brown, 20 R. I., 215; 38 Atl., 9, the court said:

"Those rules require that there shall be a court of competent jurisdiction to pass upon the subject-matter of the suit or proceeding, and that there shall be a trial or proceeding in which the rights of the parties, after notice and opportunity to be heard, shall be duly adjudicated."

In the case of Davidson v. New Orleans, 96 U. S., 97, 24 L. Ed., 616, the court held that:

It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regard the issues affecting it, he has, by the laws of the state a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.

"As we have said on more than one occasion, it may be difficult, if not impossible to give to the terms 'due process of law' a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land'. In this country the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against arbitrary de-

privation of his rights, whether relating to his life, his liberty or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient for the purposes of this case, to say that the legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subject to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters, that is, by process or proceedings adapted to the nature of the case."

Dent v. State of W. Va., 129 U. S., 114, 32nd L. Ed., 623, 626.

IV.

THE CONSTITUTIONALITY OF A STATE STATUTE CANNOT BE ATTACKED ON THE GROUND THAT IT IS REPUGNANT TO THE CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION PROHIBITING A STATE FROM DEPRIVING ANY PERSON OF PROPERTY WITHOUT DUE PROCESS OF LAW, BY ONE WHO IS NOT THEREBY DEPRIVED OF ANY PROPERTY.

If it be conceded that the defendant-in-error's title under the sale in question is invalid, still the defendant is to be treated, under the deed from Ezra S. Whitney to Sam L. Roberts, through which the defendant claims, as a mortgagee in possession and as such, it may not be divested of such possession until its claim has been satisfied. Consequently until the defendant-in-error's claim is satisfied, the operation of the statute does not deprive the plaintiff in error of any property. The latter is not in a position to complain of the operation of the statute, not only for the reasons set out in

this sub-division of this brief, but also for the reasons given in the next sub-division.

The rule in actions of ejectment where the defendant is a mortgagee in possession, has been stated as follows:

"Both at common law and generally in those jurisdictions where the mortgagee cannot recover possession of the property mortgaged without a foreclosure and sale according to law, the mortgagee or one claiming under him when rightfully in possession of the property mortgaged cannot be divested of such possession, or of any part thereof, until the claim under the mortgage is fully satisfied."

20 Am. & Eng. Enc. of Law, 2nd Ed., 1008.

"A senior mortgagee, acquiring possession by consent of the mortgagor after a foreclosure sale under a junior mortgage before the title and right of possession of the mortgagor have been extinguished by the expiration of the year for redemption, has the rights of a mortgagee in possession."

Jones v. Rigby, 41 Minn., 530, 43 N. W., 390.

In the opinion in this case the court declared that the mortgagee having been let into possession of the mortgaged premises could not be ejected while his mortgage remained unsatisfied.

The Montana statute provides that "a mortgage of realty shall not be deemed a conveyance, whatever its terms, so as to enable the mortgagee to recover the possession of the realty without foreclosure and sale." In the case of Fee vs. Swingly, 6 Mont. 596, 13 Pac. 375, the court decided that notwithstanding the terms of this statute, "where the mortgagor, after the maturity of the mortgage, gives the mort-

gagee permission to enter, the mortgagee may rightfnlly do so, and hold possession until the debt is paid," and that, "in an action of ejectment, defendant, claiming to be a mortgagee in possession under such consent, may introduce the mortgage in evidence as preliminary to show the consent to enter." In this case, the mortgagee, who was in possession under his mortgage, was not divested of possession at the suit of the plaintiff, who was, as the plaintiff, in this case is, the grantee of the original mortgagor. The opinion contains the following language:

"A mortgagee in possession of the mortgaged premises, after condition broken, and with the consent of the mortgagor, is entitled to the possession until the debt is paid. * * * If a mortgagee, with the consent of the mortgagor, after mortgage debt is due, enters into the possession of the property, the mortgagor cannot eject him until the debt is paid. the rule of a mortgagee in possession applies."

In the case of Hubbell v. Moulson, 53 N. Y., 225, it was held that:

"Ejectment does not lie by a mortgagor against the mortgagee in possession so long as the mortgage subsists."

If it may be assumed that the sale of the property in controversy under the execution issued on the fine imposed upon Ezra S. Whitney in the criminal proceeding is invalid, still the county may resist the effort of the plaintiff in error to divest it of the property as a mortgagee in possession of the mortgaged property. The original grantors under whom the plaintiff claims received only a quitclaim deed, which is in

the nature merely of a release, and in any event conveyed only such interest in the land as the grantor had—THAT WAS AN EQUITY OF REDEMPTION AND NOTHING MORE. Moreover the acceptance of a deed of this character is notice to the grantor of the rights of all other persons in the property, whether such rights are disclosed by the record or not.

"A quitclaim deed is defined as a form of deed of the nature of a release."

23 Am. & Eng. Enc. Law, (2 Ed.) 587.

"In form a quitclaim deed is like the common-law release, a derivative or secondary common-law form. In substance it is similar to an original common-law deed, creating an estate and not requiring for its operation any estate in possession or other wise in the grantee. In effect it transfers to the grantee whatever the interest the grantor has in the property described, be it a fee, chattel interest, a mere license, or nothing at all."

9 Am. & Eng. Enc. Law, (2 Ed.) 104.

"It (a quit-claim deed) implies a doubtful title, however, in the party executing it, and such being its character, it should not be held to pass anything more than a doubtful title."

Id. note p. 106, citing Kerr v. Freeman, 33 Miss., 292.

In Byron-Reed Co. v. Klabunde, 108 N. W. Rep., (Neb.) 133, in which case a rehearing was denied Nov. 22nd, 1906, the court holds:

"A purchaser of real estate, who takes by quitclaim deed, takes subject to all existing equities against the grantor."

And in the opinion the court says:

"In conveyances of real estate a quitclaim deed is of it-

self a red light to warn the grantee that the rear end of the transaction is exposed to equities."

In Schmidt v. Musson, 107 N. W., (S. D.) 367, the court says:

"A purchaser from a grantee in a quitclaim deed is not a bona fide purchaser, but takes with notice of outstanding equities."

V.

IF THERE HAD BEEN, PRIOR THERETO, ANY DOUBT AS TO THE VALIDITY OF THE COUNTY'S TITLE TO THE LAND IN QUESTION, THAT QUESTION WAS RESOLVED IN ITS FAVOR BY THE PROCEEDINGS BROUGHT AGAINST JOHN EVERSON FOR DESTROYING THE TIMBER ON THE PREMISES, AND THE MATTER IS ONE THAT HAS BEEN ADJUDICATED.

In Everson v. State, 66 Neb., 154, the main, and practically the only question presented was the ownership of the land in question. This question was decided adversely to Everson, the grantor of the plaintiff in error. The court based its decision upon the validity of the criminal proceedings against Whitney, the sentence, fine, execution, sale, confirmation, and sheriff's deed.

"A judgment between the same parties, in which a claim of plaintiff was decided, or was properly involved and might have been there raised, and determined, is a bar to another action for the same cause.

"The neglect of the plaintiff to avail himself of it furnishes no reason for litigation."

Stockton v. Ford 18 How. (59 U. S.) 418, 15 Law, Ed. 395.

In the opinion the court says:

"The bill filed by the plaintiff to charge the plantation and slaves of the defendant with a judicial mortgage, originally obtained, by one Prior against the firm of N. and E. Ford & Co. The plaintiff claims an interest in this mortgage, first: by purchase on execution against Prior; and second by a trust created in the assignment of the same by Prior, under which the defendant derived title to it." * * * "The defendant, among other defenses, sets up a former suit in bar." * * * .

"One of the questions now sought to be agitated again is precisely the same as this one in the previous suit, namely: The right of the plaintiff to the judicial mortgage under the execution and sale against Prior. The other is somewhat varied, namely: The equitable right or interest in the mortgage of the plaintiff, as the attorney of Prior, for the fees and costs provided for in the assignment to Jones. But this question was properly involved in the former case, and might have been there raised and determined. The neglect of the plaintiff to avail himself of it, even if it were tenable, furnishes no reason for another litigation. The right of the respective parties to the judicial mortgage was the main question in the former suit. That issue, of course, involved the whole or any partial interest in the mortgage. We are satisfied therefore, that the former suit constitutes a complete bar to the present."

In the case of Chapman v. Smith, 16 How, (57 U. S.) 114. 14 L. Ed., 868, which was a suit on a sheriff's bond, the former judgment pleaded was that of an Alabama county court. In the opinion, the court says:

The matters in all three of the breaches were necessarily

involved in the question of due and proper diligence on the part of the sheriff in the execution of the FI. FA. The omission to levy upon the goods, or to sell after the levy, fell directly within the issue and inquiry in that proceeding under the statute; and we are bound to presume were the subject of examination before the court and jury, and were passed upon by them. WHERE THE FACTS IN ISSUE APPEAR UPON THE RECORD, EITHER EXPRESSLY OR BY NECESSARY INTENDMENT * * * THE JUDGMENT IS CONCLUSIVE UPON THESE FACTS, BETWEEN THE SAME PARTIES OR PRIVIES, when properly pleaded.

VI.

"Due Course or Law" simply means that a person should be brought into court and have an opportunity to prove any fact for his protection; the regular course of the administration of the law being through courts of justice by timely and regular proceedings to judgment and execution, according to the fixed forms of law.

Morley v. Lake, etc., 146 U. S., 162; 13 Sup. Ct. Rep, 54.
Murray v. Hoboken Land Co., 18 How,, (59 U. S.) 272; 15 L, Ed., 372.
People v. Essex County, 70 N. Y. 229.
Central Land Co. v. Laidley, 159 . US., 103; 16 Sup. Ct. Rep., 80.

The state court, where the judgment complained of was entered, had jurisdiction to try and determine the guilt of the defendant of the offense charged. He was before the court and had an opportunity to be, and was heard in his defense. The property seized was within the jurisdiction of the state

court. Therefore, the judgment of the state court is conclusive.

Respectfully submitted,

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Attorney for Defendant.

W. A. MYERS,
W. S. MORLAN,
Of Counsel.

Supreme Court of the United States.

No. 177.—October Term, 1906.

James Coffey, Plaintiff in Error, vs. The County of Harlan. } In error to the Circuit Court of the United States for the District of Nebraska.

[February 25, 1907.]

Mr. Justice Moody delivered the opinion of the Court.

The plaintiff in error, a citizen of Kansas, brought an action of ejectment against the defendant in error, a citizen of Nebraska, in the Circuit Court for the District of Nebraska, where there was judgment for the defendant, which is brought here by writ of error on a constitutional question. The land sought to be recovered was once the property of Ezra S. Whitney, through whom both parties claim title; the plaintiff, through a deed of the land executed and delivered by Whitney, on November 30, 1893; the defendant, under a sale of the land on execution in pursuance of a levy duly made on April 12, 1898. The defendant's paper title is therefore the earlier one and must prevail if the sale upon execution was valid. The validity of this sale is the only question in the case.

The execution issued on a judgment in a criminal case, in which, by information, Whitney was charged with the embezzlement, while County Treasurer of Harlan County, in the State of Nebraska, of eleven thousand one hundred and ninety dollars of the public money in his possession by virtue of his office. Upon trial by jury Whitney was found guilty as charged and sentenced to imprisonment for a term of years, and to "pay a fine in the sum of $22,390," which was double the amount of the embezzlement found by the jury. On appeal the conviction was affirmed by the Supreme Court of Nebraska. *Whitney* v. *State*, 53 Neb. 287. The sentence awarded was that prescribed by section 124 of the Nebraska criminal code, which provides that a public officer who embezzles the public money "*shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled as aforesaid, which fine shall operate as a judgment at law on all of the estate of the party so convicted and sentenced, and shall be enforced to collection by execution or other process for the use only of the party or parties whose money or other funds, property,*

bonds or securities, assets or effects of any kind as aforesaid has been so embezzled." Compiled Statutes of Nebraska, 1903, p. 1942.

The proceedings which ended in the sale on execution under which the defendant claims title were in conformity with the Constitution and laws of Nebraska, and the sheriff's deed vested title in the defendant. *Everson* v. *State*, 66 Neb. 154. It is within the power of the State to enact laws creating and defining crimes against its sovereignty, regulating the procedure in the trial of those who are charged with committing them, and prescribing the character of the sentence which shall be awarded against those who have been found guilty. In these respects the State is supreme and its power absolute, and without any limits other than those prescribed by the Constitution of the United States. The exercise of the power of the State in this field cannot be drawn in question in this Court or elsewhere than in its own Courts, except for the purpose of restraining it within the limits thus established. One of the limitations upon the power of the State, imposed by the Fourteenth Amendment, is that the State shall not deprive any person of life, liberty or property without due process of law. The plaintiff contends that the sentence awarded against Whitney violated this prohibition, in that Whitney had no opportunity to be heard upon and defend against that part of the sentence which imposed a fine and authorized a judgment against his estate for its collection. The plaintiff therefore insists that the sale on execution of Whitney's land was bad, because the execution issued upon a judgment which was void. The short and conclusive answer to the whole contention is, that it is not true in fact. Whitney was given an opportunity to be heard and to defend. The information charged him with embezzling $11,190, the property of Harlan County. The trial was had upon this information and the jury returned a verdict in the following terms:

"We, the jury, duly empanelled and sworn in the above-entitled cause, do find the defendant guilty, as charged in the information, and we further find the sum so embezzled to be $11,190." Thereupon it became the duty of the Court to impose a sentence of imprisonment of not less than one year nor more than twenty-one years, and of a fine that should be equal to double the amount of the money embezzled. This was done. The case was then appealed to the Supreme Court of Nebraska, argued by counsel and the conviction affirmed. It is idle to say that Whitney was denied a hearing, or an opportunity for every defense, permitted to him by the laws of Nebraska.

The plaintiff in error rests his contention upon some language used by the Supreme Court of Nebraska in *Everson* v. *State*, *ub sup.* In that case Everson was convicted of a trespass upon the land in dispute. He defended against the charge by claiming title through the deed from Whit-

ney, under which, as Everson's grantee, the plaintiff in this case claims title. The State on the other hand contended that the title was in Harlan County by virtue of the sale on execution hereinbefore stated. Everson, asserting, as the plaintiff here asserts, that the execution sale passed no title, attacked the judgment upon which it was issued upon two grounds:

First, that the law under which it was rendered was repealed by a subsequent provision of the Constitution of the State;

Second, that it was unconstitutional in inflicting a double punishment, in that the fine was added to imprisonment.

In overruling these two contentions the Court described the statute as one giving a fixed sum "in the nature of liquidated damages . . . to one who has suffered injury by the wrongful act of a public officer," and said: "We do not care to put ourselves on record as holding that the return of the property or the value of the property which the thief has embezzled or stolen, either voluntarily or by compulsory process, should be considered any part of his punishment within the meaning of our Bill of Rights," p. 158. Seizing hold of this language, the plaintiff in error in this case argues that by an interpretation of the statute binding upon us it authorizes a mere civil judgment for damages, against which the defendant has been denied the right to defend, by showing that his civil liability for the embezzlement had been discharged, and that therefore the judgment was wanting in due process of law. But this argument misinterprets the decision of the Supreme Court of Nebraska by giving to its language a meaning not expressed or intended.

As part of the consequences of a conviction of the crime of embezzlement by a public officer, the law of Nebraska provides that a fine double the amount embezzled shall be inflicted, which shall operate as a judgment against the estate of the convict. It is not of the slightest importance whether this fine is called a penalty, a punishment, or a civil judgment. Whatever it is called, it comes to the convict as the result of his crime. The amount of the judgment is fixed by the amount of the embezzlement, and not by the amount remaining due on account of the embezzlement, and the only question left open to the accused is the fact and amount of the embezzlement. It is provided that the judgment shall issue for double that amount, entirely irrespective of the question whether restitution has been made in whole or in part. Upon the only question therefore open to him Whitney had an opportunity to be heard, and, in point of fact, was heard. Upon his appeal, 53 Neb. 287, the amount of the embezzlement was expressly affirmed by the court (p. 304), and the claim that the restitution of the stolen property relieves the offender from criminal liability was pronounced "a monstrous doctrine," and it was said: "Whether or not Harlan County has been successful in collecting or

securing the payment of the money which the defendant is charged with having embezzled, is of no consequence in this case." Whitney had full opportunity to present every defense allowed to him by the law of the State. The law itself was justified by the plenary power of the State, and neither it nor its administration in this case discloses any violation of a right secured by the Constitution of the United States, and the judgment of the Circuit Court is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

END OF CASE